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In The

Supreme Court of the United States

October Term, 1998

CECIL J. PICARD, et al.,

Petitioners,

versus

MARY L. HELMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the federal instructional material program, 20 U.S.C. Sections 7301-7373 as applied in Jefferson Parish, Louisiana, violate the Establishment Clause of the United States Constitution?

2. Does the state statute granting the State Board of Elementary and Secondary Education the authority to prescribe and adopt school books and other materials of instruction which it shall supply without charge to the children of [Louisiana] at the elementary and secondary levels, as applied in Jefferson Parish, Louisiana, violate the Establishment Clause of the United States Constitution?

PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: Cecil J. Picard, Louisiana State Superintendent of Education, Kenneth Duncan, Louisiana Treasurer, and Louisiana State Board of Elementary and Secondary Education who were Defendants in the district court and Appellees, Cross-Appellants in the Court of Appeals.

Respondents: Mary Helms, Amy T. Helms and Marie L. Schneider, Plaintiff-Appellants, Cross-Appellees in the Court of Appeal.

Other parties:

1. National Committee for Public Education and Religious Liberty (PEARL) (Amicus Curiae) at Court of Appeal.

2. Jefferson Parish School System, Elton Lagasse, Laurie E. Rolling, Libby Moran, Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Polly Thomas, Gene Katsanis, and Martin Marino, Defendants-Appellees, Cross Appellants in the Court of Appeals.

3. Richard W. Riley and the United States Department of Education, Defendants-Appellees in the Court of Appeals.

4. Special Education Services Corporation, Defendant-Appellant in the Court of Appeals.

PARTIES – Continued

5. Guy Mitchell, Jan Mitchell, Eugene Cerise, and Kathy Cerise, Intervenor-Defendants-Appellees-Cross Appellants in the Court of Appeal.

6. Anti-Defamation League and American Civil Liberties Union (Amicus Curiae) at Court of Appeal.

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PETITION FOR WRIT OF CERTIORARI

The petitioners urge that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Fifth Circuit which reversed a decision of the United States District Court for the Eastern District of Louisiana. That ruling declared both a federal statute (20 U.S.C. Sections 7301-7373) and a state statute (La. R.S. 17:351-352) unconstitutional, as applied, under the Establishment Clause of the United States Constitution, and conflicts with the decision of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The January 13, 1999 decision of the United States Court of Appeals for the Fifth Circuit, which denied the Petitions for Rehearing and the Suggestions for Rehearing *En Banc* but amended the last sentence of the panel opinion, is reported at 165 F.3d 311, and is reprinted at Appendix A to this petition, p. App. A1. The August 18, 1998 decision of the United States Court of Appeals for the Fifth Circuit, which reversed the trial court's grant of summary judgment on this issue is reported at 151 F.3d 347, and is reprinted at Appendix B to this petition, p. App. B1.

The January 28, 1997 decision of the United States Court for the Eastern District of Louisiana, which granted summary judgment upholding the constitutionality of the questioned statutes, is unreported and is reprinted at Appendix C to this petition, p. App. C1. The March 27, 1990 decision of the United States Court for the Eastern District of Louisiana, which granted summary judgment

holding these statutes unconstitutional is unreported and is reprinted at Appendix D to this petition, p. App. D1.

JURISDICTION

1.

The Judgment of the United States Court of Appeal for the Fifth Circuit was entered on August 17, 1998, reversing the district court's grant of summary judgment declaring Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 and La. R.S. 17:351-352 constitutional as applied.

2.

This Court has jurisdiction under 28 U.S.C. Section 1254(1). Petitioners seek review of a decision by the Fifth Circuit Court of Appeals declaring a federal and a state statute unconstitutional under the First Amendment which conflicts with a decision of the Ninth Circuit Court of Appeals upholding the constitutionality of the federal statute. The issue presented is whether or not these statutes are in violation of the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case:

United States Constitution

U. S. Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion . . . "

United States Code

20 U.S.C. Sections 7301-7373

Contained in Appendix E, App. E1

State Law

La. R.S. 17:351-352 as applicable in 1985

§ 351. Free school books and other materials of instruction

A. The State Board of Elementary and Secondary Education shall prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of this state at the elementary and secondary levels out of funds appropriated therefor by the legislature in accordance with the requirements of Article VIII, Section 13 (A) of the Constitution.

B. The board shall prescribe and supply schoolbooks and other materials of instruction for use by students

attending vocational-technical schools and programs under the jurisdiction of the board.

§ 352. Books, films, other school materials; screening required

A. The State Board of Elementary and Secondary Education, the State Department of Education, or either of these shall take such action as is necessary to assure that all school books, films and booklets related thereto, other similar audio-visual devices, and any other similar materials of instruction are thoroughly screened, reviewed and approved as to their content by the State Board of Elementary and Secondary Education and the local parish or city school board concerned.

B. The State Board of Elementary and Secondary Education shall maintain a copy of all approved textbooks and teaching materials. Such textbooks and teaching materials shall be maintained in the Department of Education for a period of one year following their initial approval and thereafter shall be maintained in the department's book depository during the time they are approved for use in Louisiana's public schools. Such textbooks and teaching materials shall be available for public inspection during regular office hours.

C. The State Board of Elementary and Secondary Education shall adopt rules and regulations to carry out the provisions of this Section.

D. Whoever intentionally violates any provision of this Section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed

five hundred dollars or by imprisonment for not to exceed six months, or both.

STATEMENT OF THE CASE

Plaintiffs filed suit in 1985 claiming that Chapter 2 of Title 1 of the Elementary and Secondary Education Act of 1965 ("Chapter 2") and its Louisiana counterpart, LA. REV. STAT. ANN. 17:351-52 (West 1982 & West Supp. 1998), violate the Establishment Clause as applied in Jefferson Parish insofar as they provide direct aid to sectarian schools in the form of educational and instructional materials.

Initially, the District Court on March 27, 1990, agreed and granted Plaintiffs' motion for summary judgment, finding that the loan of state-owned instructional materials (such as slide projectors, television sets, tape recorders, maps, globes, computers, etc.) to pervasively sectarian institutions had the "primary effect of providing a direct and substantial advancement to the sectarian enterprise" and therefore violated the Establishment Clause. The court relied primarily on *Wolman v. Walter*, 433 U.S. 229, 250, 97 S.Ct. 2695, 53 L.Ed.2d 714 (1977), and *Meek v. Pittenger*, 421 U.S. 349, 363, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

When the case was reassigned due to Judge Frederick Heebe's retirement, Judge Marcel Livaudais granted Defendants' motion to reconsider the court's ruling on January 28, 1997. Following the reasoning of the Ninth Circuit in *Walker v. San Francisco Unified School District*, 46 F.3d 1449, 1463-70 (1995), Judge Livaudais found that the

reasoning in *Meek* and *Wolman, supra,* had been undermined by subsequent Supreme Court cases. He therefore reversed Judge Heebe's finding of unconstitutionality and granted Defendants' motion for summary judgment, declaring Chapter 2 and LA. REV. STAT. ANN. 17:351-52 constitutional, facially and as applied in Jefferson Parish.

On appeal, Fifth Circuit Court of Appeals on August 17, 1998, reversed the judgment by Judge Livaudais and found that Chapter 2, 20 U.S.C. Sections 7301-7373 and La. R.S. 17:351, 352 were unconstitutional as applied to the extent that either program permitted the loaning of educational or instructional equipment and materials on the grounds that Supreme Court jurisprudence only allows the lending of free textbooks to parochial schools.

On January 13, 1999, the Fifth Circuit denied Petitions for Rehearing and Suggestions for Rehearing En Banc but amended the last sentence of the panel opinion to clearly exclude the statutes as applied for the acquisition of textbooks.

On February 23, 1999, an order was filed by the Fifth Circuit Court of Appeals granting a stay in this matter.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has entered a judgment in direct conflict with a decision of the Ninth Circuit Court of Appeals. The Court held that 20 U.S.C. Sections 7301-7373 unconstitutional as

applied in Jefferson Parish, Louisiana and that the Louisiana counterpart statute, La. R.S. 17:351-352 likewise unconstitutional as applied in Jefferson Parish, Louisiana.

Although Congress enacted the Improving America's School Act of 1994, re-labeling the former Chapter Two as "Subchapter VI – Innovative Education Program Strategies", like the Court of Appeals below, the program will be referred to as Chapter Two for ease of reference.

Chapter Two provides "block grants" to state and local educational agencies to implement eight "innovative assistance programs".

Chapter Two has:

> "Programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program."

20 U.S.C. Section 7351(b)(2).

Chapter Two services are provided to children enrolled in both public and private schools. 20 USC Section 7312. Chapter Two funds must supplement and not supplement funds from non-federal sources. 20 USC 7371(b). The control of Chapter Two funds as well as title to all Chapter Two materials, equipment and property must be in a public agency which administers such funds and property. 20 USC 7372(c)(1). Any services provided

for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." 20 USC 7372(c)(2).

Funds under Chapter Two are earmarked to Local Educational Agencies (LEAs) in two areas – eighty-five percent based on the number of students in both public and non-public schools and in fifteen percent based on the number of children from low-income families.

During fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter Two funds, about 70% of those funds were allocated to public schools and about 30% to non-public schools.

The State of Louisiana made monitoring visits to the LEAs and to some non-public schools. The LEAs made monitoring visits to non-public schools. The United States Department of Education conducted an on-site visit to review the Louisiana Chapter Two program. The Louisiana Department of Education increased the frequency of on-site visits from once every three years to once every two years. The Coordinator of the Chapter Two program in Jefferson Parish makes a visit to a given non-public school during the year. No direct payments of Chapter Two funds are made to non-public schools.

La. R.S. 17:351 requires the State Board of Elementary and Secondary Education to prescribe and adopt school books and other materials of instruction which it supplies without charge to the children of Louisiana. La. R.S. 17:352 requires that any books or instructional materials provided are thoroughly screened, reviewed, and approved as to their content. The overwhelming portion

of funds allocated under these state laws are used to purchase textbooks. Books and instructional materials may only be ordered from state-approved lists and sources.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) this court set up a three part test for Establishment Clause challenges. Under this test, a governmental practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. Recently, this court reaffirmed the importance of the "purpose" prong and concluded that the "effect" and "entanglement" prongs rightly comprise a single "effect" inquiry. *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

Neither the Ninth Circuit in *Walker v. San Franciso Unified School District*, 46 F.3d 1449, 1464 (9th Cir. 1995) nor the Fifth Circuit in this case had any problem that Chapter Two and the state statutes has the valid secular purpose of improving education. Nor does any party advance the argument that these statutes do not have a valid secular purpose.

Thus, the constitutionality of Chapter Two and the state statutes depends upon the second and third prongs of the *Lemon* test, as modified by *Agostini*.

Initially, *Agostini* expressly rejects the general proposition, stated in *Grand Rapides Sch. Dist. v. Ball*, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985) and *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985)

that "all government aid that directly aids the educational function of religious schools is invalid." 117 S.Ct. at 2011.

The Fifth Circuit below followed a boundary line based upon the character of the state aid to parochial schools, rather than focusing upon the *Lemon* test as modified by *Agostini*, citing this court's decisions in *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) and *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2695, 53 L.Ed.2d 714 (1977) as controlling precedent. However, the constitutionality of Chapter 2 and the state statutes have never been reviewed by this Court. There are no controlling precedents with direct application requiring the deferential approach adopted by the Fifth Circuit in this matter.

Chapter 2 and the state statutes are religiously neutral and provides secular benefits neutrally to both public and nonpublic school children. There is no question that this neutrality principle is of prime importance in assessing Establishment Clause challenges. In *Witters v. Washington Department of Services For The Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), this Court upheld the spending of state funds for a blind student's education at a bible college to become a pastor, missionary or youth director. This Court explained its decision as resting in part on the fact that the aid was "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Witters*, at 487.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993), this Court

approved aid in support of education at a pervasively sectarian educational institution, specifically holding that the Establishment Clause was not violated by the provision of an interpreter to a deaf student attending a Roman Catholic high school. The Court noted: [W]e have consistently held that governmental programs that neutrally provide benefits to a broad class of citizens defined without regard to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8.

This Court in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) strengthened the neutrality principle by noting: "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion." *Id.* at 839.

Finally, in *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), this Court noted with approval its prior decisions "sustain[ing] programs that provided aid to all eligible children regardless of where they attended school." *Id.* at 220.

The application of the neutrality principle under the Establishment Clause would also be consistent with its application under the Free Exercise Clause, bringing consistency in interpretation under both of the religion clauses. *See Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

As in *Zobrest*, *Rosenberger*, and *Agostini*, no funds under Chapter Two or the state statutes in this case ever

reached the coffers of the participating religious schools. There is no evidence in this case that sectarian schools used either federal or state funds to redirect their own funding to a religious mission or to otherwise relieve them of burdens previously undertaking or required by law. Indeed the benefits of Chapter Two and the state statutes flow to the students, not to schools.

Diversion of Chapter Two services, materials and equipment would violate the statute and would lead to a removal of equipment and supplies from a private school.

Control of Chapter Two and state funds remain in a public agency to administer such funds and property as does the ownership of the property.

To prevent unauthorized diversion, a program of monitoring is in place. This monitoring program was held to be sufficiently broad and effective by the district court below. The Fifth Circuit fails to discuss this monitoring program in its discussion on the challenge to Chapter Two nor did the Court of Appeals refute the holding in *Walker* that Chapter Two safeguards from improper diversion to religious use were adequate. The Fifth Circuit also did not contradict *Walker's* finding that Chapter Two did not violate the "entanglement" prong of *Lemon*, given the minimal intrusion by state monitors and the nature of neutral instructional materials and equipment, which *Walker* found to be "self-policing." *Walker*, 46 F.3d at 1469.

It is important to stress that neither the plaintiffs nor the Fifth Circuit cite any instances of diversion of Chapter Two or state equipment and materials to religious use. The safeguards and monitoring these programs employ, though impossible to eliminate totally the risk of such

diversion, are sufficient to prevent or detect them. As this Court stated in *Agostini*, evidence supporting the insufficiency of a particular monitoring system will be required before the Court will conclude that public teachers on parochial school grounds are impermissibly inculcating religion. It is submitted that the same requirement should apply to the monitoring and safeguards of Chapter Two.

CONCLUSION

Chapter Two and the state statutes do not run afoul of any of the three criteria used to evaluate whether government aid has the effect of advancing religion. They do not result in governmental indoctrination; they do not define their recipients by reference to religion; they do not create an excessive entanglement.

As these statutes meet the *Lemon* test they are constitutional under the Establishment Clause. This Honorable Court should so hold and reverse the decision of the Fifth Circuit.

For the foregoing reasons, and on the basis of the authorities cited, petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Mary L. HELMS, individually and as next friend of Amy T. Helms; Amy T. Helms, a minor; Marie L. Schneider, Plaintiffs-Appellants-Cross Appellees-Appellees,

v.

Cecil J. PICARD, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education; Jefferson Parish School Board System; Elton Lagasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; Libby Moran, Vice President and member of the Jefferson Parish School Board; Robert Wolfe, member of the Jefferson Parish School Board; Barry Bordelon, member of the Jefferson Parish School Board; O.H. Guidry, member of the Jefferson Parish School Board; Cedric Floyd, member of the Jefferson Parish School Board; Polly Thomas, member of the Jefferson Parish School Board; Gene Katsanis, member of the Jefferson Parish School Board; Martin Marino, member of the Jefferson Parish School Board, Defendants-Appellees-Cross Appellants,

and

Richard W. Riley, Secretary of the United States Department of Education; United States Department of Education, Defendants-Appellees,

and

Special Education Services Corporation, Defendant-Appellant,

and

Guy Mitchell; Jan Mitchell; Eugene Cerise; Kathy Cerise, Intervenor Defendants-Appellees-Cross Appellants.

No. 97-30231.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1998.

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Appeals from the United States District Court for the Eastern District of Louisiana.

Before DUHE, BENAVIDES and STEWART, Circuit Judges.

DUHE, Circuit Judge:

I.

This case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence. Plaintiffs, as taxpayers, sued Defendant Jefferson Parish School Board et al., claiming that three state and one federal school aid programs were unconstitutional as applied in Jefferson Parish, Louisiana.[1] The District Court initially granted Plaintiffs' motion for summary judgment on some issues. The court then conducted a bench trial on the remaining issues and rendered judgment. When the case was reassigned due to the district judge's retirement, the new judge reversed some of the court's earlier rulings. All told, the parties spent some thirteen years in district court before reaching this Court. During that time the sand dunes have shifted.

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[1] The challenged aid programs and the procedural history of the case are more fully developed infra.

II.

Plaintiffs first challenge Louisiana's special education program, codified at La.Rev.Stat.Ann. § 17:1941-1956 (West 1982 & West Supp.1998), as administered in Jefferson Parish, under the Establishment Clause. After a bench trial, the district court ruled that the special education program was unconstitutional as applied, because it had the impermissible effect of advancing religion and because the monitoring necessary to prevent such an effect would result in excessive entanglement between church and state. *See Helms v. Cody*, 856 F.Supp. 1102, 1121 (E.D.La.1994) ("*Helms*").

A.

"It is and shall be the duty of state, city and parish public school systems of the state of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein." La.Rev.Stat.Ann. § 17:1941 ("special education statute").[2]

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[2] An "exceptional child" is one who is mentally disabled, gifted and talented, hard of hearing, deaf, speech impaired, severe language disordered, visually impaired, emotionally disturbed, orthopedically impaired, hospital/homebound, other health impaired, learning disabled, which includes attention deficit disordered and dyslexia, traumatic brain injured, or autistic, and as a result may require special education or services.

La.Rev.Stat.Ann. § 17:1943(2)(West Supp.1998). We will note any provisions of the special education statute that have been amended since the time of trial and whether those amendments have any bearing on the questions before us.

Louisiana law defines "special education" as "any program of instruction within the preschool, elementary, and secondary school structures of the state, specifically designed to provide for different learning styles of exceptional children." La.Rev.Stat.Ann. § 17:1943(4) (West Supp.1998). Special education programs are administered by the State Department of Education ("the Department") at the state level, and by parish or city school boards at the parish or city levels; at those lower levels, the Department provides "only general supervision and monitoring." La.Rev.Stat.Ann. § 17:1944(A)(1) (West Supp.1998).[3]

The district court found that state funds for special education programs are allocated to the Jefferson Parish Public School System ("JPPSS") "based on the number of exceptional children served by employees of the local school board, consistent with state-required pupil/teacher ratios for the provision of services to students with particular exceptionalities." *Helms*, 856 F.Supp. at 1110. The court also found that "[t]he public school system receives federal monies based on the 'child count' of special education students enrolled at both public and nonpublic schools." *Id.*

The Department or city/parish school boards are authorized to "enter into a purchase of services agreement with any other public or nonpublic school, agency or institution to provide free appropriate education to

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[3] Additionally, the office of special education services within the Department provides "general supervision and monitoring of all education programs for exceptional children conducted within the state." La.Rev.Stat.Ann. § 17:1944(A)(2) (West Supp.1998).

exceptional children in need of special education and related services. . . . " La.Rev.Stat.Ann. § 17:1949-50 (West 1982). Pursuant to that authority, the Jefferson Parish School Board ("JPSB") contracted with the Special Education Services Corporation ("SESC") to provide special education services by public school teachers at private schools operated under the authority of the Archdiocese of New Orleans.[4] The district court found that at the time of trial the sole employee of SESC (its executive director Jan Janz) was also a paid employee of the Office of Special Education for the Archdiocese of New Orleans; additionally, the members of the SESC were

> [t]he respective Presidents of the Archdiocesan School Board and Diocesan School Board of the Roman Catholic Archdiocese of New Orleans, and the Roman Catholic Diocese of Lafayette, Baton Rouge, Houma-Thibodeaux, and Lake Charles, and a representative to be appointed by the Bishop of the Diocese of Alexandria-Shreveport, respectively.

Helms, 856 F.Supp. at 1108. The court thus concluded that SESC was a "religiously-affiliated corporation." *Id.*

The availability of special education services on the premises of nonpublic schools in Jefferson Parish caused

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[4] SESC was established as a Louisiana nonprofit corporation in 1981. It was organized for the purpose of "assist[ing] students who are having academic and behavior problems to cope in the school environment." Although SESC was originally funded with $1.65 million by the 1982 Legislature, the District Court found that since at least 1987, SESC has not received any funds from the State of Louisiana or any other governmental body. *See Helms*, 856 F.Supp. at 1108.

a "dramatic escalation of requests for special-education teachers and aides by the approved nonpublic schools. . . . " *Helms*, 856 F.Supp. at 1108. Wary that such a trend might funnel off too many students and teachers to private schools, in 1982 the JPSB formed a committee comprised of its staff and staff from the Archdiocese of New Orleans to study the problem. The committee issued a report recommending, inter alia, (1) that state funding for teachers and aides working in nonpublic schools be capped at its 1982-83 levels (excluding teachers covered under the contractual agreement for 1982-83 with SESC); (2) that, beginning with the 1983-84 academic year, "the total local costs for any new positions or vacancies for teachers or teacher aides will be borne by the Catholic schools to which these persons are assigned"; and (3) that the Archdiocese would be able to establish new special education classes at its schools, but that "the total local costs . . . [would] be the responsibility of the individual schools." *Id.* at 1109. The JPSB approved the report.

The JPSB/SESC contract for the 1989-90 school year provided that the JPSB would hire up to 14 special education teachers and up to 5 teacher assistants. These teachers and assistants were assigned to Chinchuba Institute for the Deaf and eight parochial schools.[5] Under the contract, the classrooms were to be provided by SESC at

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[5] The eight parochial schools were Immaculate Conception High School, Archbishop Rummel High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School.

no cost to the JPSB. The special education programs conducted in those classrooms would be supervised by both the JPSB and the administrator of SESC.

Pursuant to the contract, SESC billed the JPSB for the cost of the special education teachers and teacher assistants provided to the nine nonpublic schools. For the fiscal year 1989-90, that cost was estimated to be approximately $149,583.00. The salary of a special education teacher, one facet of those costs, consists of (1) money from the "minimum foundation" program (i.e., money that comes to Jefferson Parish from the State); and (2) the local salary supplement. In the public schools, the JPSB pays the local salary supplement. By contrast, in the nonpublic schools the SESC agreed to pay the supplement. Since 1987, SESC has been funded by contributions from the participating nonpublic schools. The parents of special education students attending these nonpublic schools pay a supplemental fee to SESC, in addition to tuition they would normally pay. *See Helms*, 856 F.Supp. at 1117.

Jefferson Parish special education teachers in both public and nonpublic schools are subject to the same Collective Bargaining Agreement. A clause in the 1989-90 agreement states that "[p]ositions in special education classes which are provided in nonpublic schools and are a duplication of services provided by the Jefferson Parish Public School System shall be filled only after all special education positions in the Jefferson Parish Public School System have been filled by certified special education teachers." *See Helms*, 856 F.Supp. at 1110 (emphasis added). Notably, however, an exception to that clause states that "[t]he Board shall not involuntarily transfer

special education teachers assigned to nonpublic schools prior to the 1983-84 school session unless pupil-teacher ratio changes reduce teacher needs." *Id.* at 1110-11. The district court found that this exception functions as a "compromise agreement involving public school teachers providing special education services at nonpublic schools." *Id.* at 1111 (internal quotes omitted). Twelve of the fourteen special education teachers currently employed by the Jefferson Parish Public School System and providing services at nonpublic schools are there by reason of the exception in the Collective Bargaining Agreement ("the grandfather provision"). *Id.*

Pursuant to State regulations, the JPSB and SESC entered into an "interagency agreement," to be effective for one year from July 1, 1989, the stated purpose of which was to "formalize the cooperation and to identify the responsibilities" of the two entities regarding the special education program. *See Helms*, 856 F.Supp. at 1113. The interagency agreement does not specifically provide for monitoring to determine whether the special education teacher engages in either religious discussion or conduct. The contract only provides that the principal of the nonpublic school "will ensure that the policies and procedures of the [JPSB] will be followed in all areas of cooperative effort." *Id.*[6] The State, however, conducts

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[6] Nonpublic school principals are also contractually bound to "enforce, apply, and follow all [JPSB] personnel policies and procedures, including but not limited to the Collective Bargaining Agreement, the Teacher Evaluation Program, and the Teacher Assistant Evaluation Program, in the 'management and supervision of the teachers' employed by the JPPSS." *Helms*, 856 F.Supp. at 1114.

inspections of randomly selected special education programs once every three years; these inspections include a thorough review of students' school records and interviews with teachers and principals. *Id.* at 1114.

The teaching responsibilities of each JPPSS special education teacher are described in the Individualized Education Program ("IEP") of each of the teacher's students. An IEP describes each child's entire special education curriculum. State regulations mandate that "[t]he responsibility for the development of each initial IEP rests with the [public] school system's special education supervisor." *Helms*, 856 F.Supp. at 1114. Religious instruction is not described in the IEP, nor do church or religious officials have any authority whatsoever over the content of the IEP. *Id.* Moreover, special education teachers must and do teach only what is outlined in the IEP. *Id.*

The District Court specifically found that: "[t]he JPPSS special education teachers at nonpublic schools do not teach religion" *Id.*; "[t]he special education classrooms are used only for special education instruction" *Id.*; and that "JPPSS special education teachers at the eight Catholic schools are not required to attend any religious services." *Id.*

Special education teachers teach in self-contained or resource classrooms within each Catholic school's facility. JPPSS requires all special education classrooms to be "located in the center of the school" to make it easier for students to get to their classroom. To that end, most classrooms are located in the main school building or on

the main school campus.[7] No sign or other special designation indicates that the special education classroom or area used is a public school classroom or area. *See Helms*, 856 F.Supp. at 1115.

Nonpublic school principals may assign JPPSS special education teachers non-teaching custodial duties involving oversight of student safety and behavior – such as lunch duty or bus duty – only in a manner consistent with the Collective Bargaining Agreement. Pursuant to that agreement, the special education teachers may also be required to attend faculty meetings no more frequently than once per month, for one hour. *See id.* at 1114.

The JPSB/SESC contract states that "[t]eacher evaluation in the nonpublic schools falls under the auspices of the [JPPSS]; therefore, the nonpublic schools must follow all policies and procedures of the [JPPSS] governing teacher evaluation." The contract also stipulates that in the nonpublic schools, principals and special education teachers shall participate in evaluation and special education policies and procedures. *See id.* at 1115. The principal of the nonpublic school is the "supervisor and 'formal evaluator' of the special education teachers in that school." *See id.* at 1117. The record indicates that the principal, through actual classroom observation of the special education teachers and through interviews, performs limited evaluations of the teachers' "teaching abilities" and "classroom management skills." The record also

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[7] The one noted exception is at St. Christopher's Elementary School, where the special education classroom is located in a portable unit.

indicates the principal's supervisory role is strictly circumscribed by JPPSS. There is no evidence demonstrating that the principals have supervisory authority over the content of the special education program.

The District Court made the following findings regarding Mary L. Cerise, a JPPSS special education teacher at St. Angela Merici. Prior to her employment as a special education teacher by JPPSS, Cerise was employed by St. Angela Merici for approximately ten years as an elementary education teacher. Now, however, she informs her students that she is a JPPSS employee; parents become aware of her employment when they sign the child's IEP. In testifying about her contacts with the principal at St. Angela Merici, Cerise indicated that "during the day he often walks in and out of the classrooms." Cerise also testified that the principal was her immediate supervisor in that "[h]is position is to see that [she] implement[s] the program as outlined on the [IEP] and that [she is] carrying out the instructional objectives and trying to meet the needs of each child that is in [her] care." *See Helms*, 856 F.Supp. at 1116.

Prior to Cerise's tenure, an employee of JPPSS would regularly monitor Cerise's files and classroom activities at the school. Since her tenure, however, no state employee has monitored her classroom; instead, she writes down everything she does in the IEP, which is sent to an "IEP specialist" and then returned to her with accompanying commentary. The IEP specialist, Barbara Cavallino, a JPPSS employee, did not visit St. Angela Merici during the 1989-90 school year, but did visit once during the previous year. Cerise's contact with the IEP specialist is normally by telephone and occurs whenever

she has an "academically or IEP-related" question that she wants clarified. *See id.*

In addition to the student report cards issued by the parochial school, Cerise must complete a progress report which is required by the JPPSS for every special education student. Cerise attends faculty meetings at St. Angela Merici on a monthly basis. She attended one general workshop for all special education teachers sponsored by the JPPSS at the beginning of the 1989-90 school year. *See id.*

Jan Janz, the sole employee and executive director of SESC, has "general supervision" of the special education program provided on nonpublic school premises by the JPSB/SESC contract. She visits the special education classrooms and monitors the evaluations and the IEPs of the special education students that are on file. Janz testified that she did not specifically monitor for religious symbols in the special education classrooms, but that if she observed a religious symbol in the classrooms, she "would ask that they remove it." Barbara Turner Windhorst, the director of special education from June of 1982 to January of 1987, was not aware of any JPPSS policy which required the director of special education to observe whether religious symbols were present in the special education classrooms. She did not investigate for the presence of religious symbols, nor did she recall whether any religious symbols were present in the special education classrooms. The State of Louisiana has no policy that requires its employees to inspect the special education classrooms for such symbols. *See id.* at 1117.

JacLynn Welsch, a volunteer teacher's assistant to Jean Douglass (a JPPSS special education teacher also at St. Angela Merici), testified that Douglass taught special education classes to upper grades in a partially partitioned classroom. The classroom also serves as the special education room for another teacher. Welsch testified that there is a crucifix in the room. *See id.* at 1116.

The district court ended its fact-findings with the following conclusions:

> (1) "[S]pecial education teachers employed by the [JPSB] provide special education services on the premises of parochial schools";
>
> (2) "[T]here was no financial incentive for the parents of special education students to choose a nonpublic school. In fact it is undisputed that the students would have received special education at no cost in the public schools. Instead, the parents of special education students elected to pay an extra charge, in addition to the regular tuition, in order for their children to attend a parochial school";
>
> (3) "The State of Louisiana is presently disbursing funds to Jefferson Parish to provide special education services to all qualified children in Jefferson Parish, whether they attend public or nonpublic schools";
>
> (4) "[N]o state, federal, or Jefferson Parish funds are paid directly to SESC or to the parochial schools. Rather, SESC contributes monies to the [JPSB] to help pay for the salaries of the JPPSS special education teachers located at the parochial schools. SESC receives its monies from the individual schools providing the special education services";

(5) "[T]he parochial schools have received a direct economic benefit by furnishing special education services on their premises. The parochial schools receive tuition and a special education surcharge from the special education students, yet they are not responsible for the full salaries of the JPPSS special education teachers. The JPPSS special education teachers are paid by the [JPSB] with funds primarily obtained from the State of Louisiana and supplemented by the parochial schools through SESC";

(6) "[I]f the special education services were not provided at the nonpublic schools, those special education students would be compelled to attend public schools which provide the necessary services at no charge to the parents. Thus, the nonpublic schools would be deprived of an economic benefit, that is, the tuition and the special education surcharge received from the special education students."

Helms, 856 F.Supp. at 1117-18.

B.

The district court began its conclusions of law by holding that the eight Catholic schools at issue here are "pervasively sectarian." *Helms*, 856 F.Supp. at 1118, quoting *Bowen v. Kendrick*, 487 U.S. 589, 610, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). Regarding the familiar three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the court observed that "even though *Lemon* has not been overruled, its continuing vitality appears to be in question." *Helms*, 856 F.Supp. at 1118, citing *Lamb's Chapel v. Center Moriches Union Free*

School Dist., 508 U.S. 384, 113 S.Ct. 2141, 2148 n. 7, 124 L.Ed.2d 352 (1993).

Thus, the court relied primarily on the analysis used in the Supreme Court's (then) most-recent Establishment Clause case, *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993). *Zobrest* held that the Establishment Clause does not bar a school district from furnishing an exceptional child with a sign-language interpreter at a parochial school "in order to facilitate his education." *Zobrest*, 509 U.S. at 14, 113 S.Ct. 2462. The district court followed the *Zobrest* analysis and asked whether the Louisiana special education program, as applied in Jefferson Parish, more closely resembled the school aid programs found constitutional in *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), and *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), or instead more closely resembled the school aid programs struck down in *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). *See Helms*, 856 F.Supp. at 1118-19, citing *Zobrest*, 509 U.S. at 7-14, 113 S.Ct. 2462.

Ultimately, the court found that "the situation in the instant case more closely resembles *Meek* and *Ball*, rather than *Mueller* and *Witters*." *Helms*, 856 F.Supp. at 1120-21. In the court's view, the provision of special education services on parochial school premises, where the teachers are paid by a combination of State and SESC funds, amounted to "assistance . . . given directly to the schools themselves, and not indirectly through the parents or

students." *Id.* Quoting from *Meek*, the court thus concluded that the JPPSS special education teachers were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id.* at 1121, quoting *Meek*, 421 U.S. at 371, 95 S.Ct. 1753. Further, the court found that the continuing surveillance necessary to insure that teachers would not inculcate religion "could result in administrative entanglement between the parochial schools and the State and Jefferson Parish." *Helms*, 856 F.Supp. at 1121, citing *Meek*, 421 U.S. at 372, 95 S.Ct. 1753. Consequently, the court felt itself "compelled to find that the special education statute, La.Rev.Stat.Ann. §§ 17:1941-1956, which allows state-paid teachers to teach on the premises of pervasively sectarian institutions, violates the Establishment Clause as applied." *Helms*, 856 F.Supp. at 1121.

C.

1.

When we view the deceptively simple words of the Establishment Clause[8] through the prism of the Supreme Court cases interpreting them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"

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[8] "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I.

as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling. *See Lemon*, 403 U.S. at 612, 91 S.Ct. 2105, quoted with approval in *Mueller*, 463 U.S. at 393, 103 S.Ct. 3062, and *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

That said, we begin by observing that the Supreme Court's most recent sermon in this area, *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), which was not available to the district court, must control the outcome here, as it presents a factual situation closely analogous to our own. *See* discussion infra. *Agostini* overruled a portion of *Ball, supra*, a case on which the District Court relied. *See Agostini*, at ___, 117 S.Ct. at 2016, overruling *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and overruling in part *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985). The crucial question before us is whether *Agostini* mandates a different result than that reached by the district court. We hold that it does.

Agostini considered the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. § 6301 et seq. ("Title I"). Title I channels federal funds, through the States, to "Local Educational Agencies" ("LEAs"), which in turn spend the funds to provide remedial education, guidance and job counseling to eligible students. *See Agostini*, at ___, 117 S.Ct at 2003. An eligible student is one who resides within the attendance boundaries of a school located in a low-income area and who is failing, or is at risk of failing, the State's student performance standards. *Id.* at ___-___, 117 S.Ct. at 2003-04. Title I requires that

funds be made available equitably to all eligible children, whether they attend public or private schools. *Id.* at ___, 117 S.Ct. at 2004.

When an LEA provides Title I services to children attending private schools, those services are subject to heightened constraints. For example, Title I services may be provided only to eligible private school students and, unlike at public schools, those services therefore cannot be provided on a "school-wide" basis. *See id.* Additionally, the LEA must retain complete control over Title I funds and must retain title to all materials used in conjunction with Title I services. *Id.* The LEA also must provide those services through public employees or other persons independent of the private school and any religious institution. *Id.* Importantly, the Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school. *Id.*

The LEA in *Agostini*, the Board of Education of the City of New York, struggled for over a decade attempting to provide Title I services to private school students within its jurisdiction. *See Agostini*, at ___, 117 S.Ct. at 2004. After unsuccessful experiments involving the off-campus provision of services, the Board of Education implemented the plan that invoked the wrath of the *Agostini* plaintiffs:

> That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a

> voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. [A] large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

Agostini, at ___, 117 S.Ct. at 2004 (citations omitted). As an additional safeguard, public employees providing Title I services on private school premises "would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised." *Id.* Consultations with a student's regular classroom teacher were limited to "mutual professional concerns regarding the student's education." *Id.* at ___, 117 S.Ct. at 2005. Finally, "a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month." *Id.*

In 1987 six federal taxpayers sued claiming that the Board's Title I program violated the Establishment Clause. At the conclusion of the dispute's first lap through the Federal court system, the Supreme Court affirmed the decision of the Second Circuit, holding that the program was unconstitutional because it "necessitated an 'excessive entanglement of church and state in the administration of [Title I] benefits.' " *Agostini*, at ___, 117 S.Ct. at 2005, quoting *Aguilar*, 473 U.S. at 414, 105 S.Ct. 3232. Consequently, on remand the district court permanently enjoined the Board of Education from allowing State-funded "public school teachers and guidance

counselors to provide teaching services on the premises of sectarian schools within New York City." *Agostini*, at ___, 117 S.Ct. at 2005.

In 1995, the Board, together with a group of parents of parochial school children entitled to Title I services, moved the District Court under Federal Rule of Civil Procedure 60(b), seeking relief from the permanent injunction on the grounds that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." *Id.* at ___, 117 S.Ct. at 2006, quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Both the district court and the Second Circuit denied relief, but the Supreme Court reversed and vacated the injunction. *Agostini*, at ___, 117 S.Ct. at 2019.

The central question before the Court in *Agostini* was "whether *Aguilar* [had] been eroded by [the Court's] subsequent Establishment Clause cases." *Id.* at ___, 117 S.Ct. at 2008. To answer it, the Court first had to discuss the underpinnings of *Aguilar* and its companion case, *Ball*:

> Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and, (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of

> private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Agostini, at ___, 117 S.Ct. at 2010. The Court then proceeded to demonstrate how its intervening decisions had "undermined the assumptions upon which *Ball* and *Aguilar* relied." *Id.*

While the Court reaffirmed the bedrock principle that "government inculcation of religious beliefs has the impermissible effect of advancing religion," the Court found that cases subsequent to *Aguilar* had "modified in two significant respects the approach [it] use[s] to assess indoctrination." *Agostini*, at ___, 117 S.Ct. at 2010. The first sea-change the Court noted in its indoctrination analysis was that it had:

> abandoned the presumption erected in *Meek* and *Ball* that the placement of public school employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.

Id., citing *Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462. No longer, then, would a public employee on sectarian school property "be presumed to inculcate religion in the students," without evidence to the contrary. *Agostini*, at ___, 117 S.Ct. at 2011; *see also id.* at ___, 117 S.Ct. at 2012 ("Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school

premises attempted to inculcate religion in students."). Nor would the mere presence of a public employee on the premises of a religious school "create[ ] an impermissible 'symbolic link' between government and religion." *Id.* at ___, 117 S.Ct. at 2011. The Court thus demolished with one swift stroke the first two assumptions upon which *Ball* had stood. *See id.* at ___, 117 S.Ct. at 2010.

The second "significant" alteration the Court noted was that it had "departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at ___, 117 S.Ct. at 2011 (emphasis added). The Court, however, was somewhat cryptic about how one might distinguish between valid and invalid government aid that "directly aids the educational function of religious schools." From the Court's reliance on *Zobrest, supra,* and also on *Witters v. Washington Dept. of Services for the Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), however, we can glean the kinds of requirements the Court might demand of such aid. First, it was crucial in the Court's view that any aid be neutral – that is, that any aid be "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited." *Agostini,* at ___, 117 S.Ct. at 2011, quoting *Witters,* 474 U.S. at 487, 106 S.Ct. 748. Second, the Court required that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals." *Agostini,* at ___-___, 117 S.Ct. at 2011-12, quoting *Witters,* 474 U.S. at 487, 106 S.Ct. 748. Relative to the second requirement, the Court noted that an aid program's eligibility criteria may ensure that the aid flows to sectarian institutions only as

a "result of the private decision of individual parents" (i.e., if the aid is given based on factors unrelated to religion, the fact that some aid is channeled to religious schools is a function of the parents' decision to send their children to such schools and therefore "[can] not be attributed to state decisionmaking."). *Agostini*, at ___, 117 S.Ct. at 2012, citing *Zobrest*, 509 U.S. at 10, 113 S.Ct. 2462. Finally, the aid cannot "indirectly finance religious education by 'reliev[ing] the sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students.' " *Agostini*, at ___, 117 S.Ct. at 2012, citing *Zobrest*, 509 U.S. at 12, 113 S.Ct. 2462.[9]

The criteria by which an aid program identifies its beneficiaries may, in the Court's view, advance religion in another way: "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini*, at ___, 117 S.Ct. at 2014, citing *Witters*, 474 U.S. at 488, 106 S.Ct. 748, and *Zobrest*, 509 U.S. at 10, 113 S.Ct. 2462. The Court provided a test for determining whether aid criteria create such an incentive:

> This incentive is not present, however, when the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

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[9] The Court also observed that whether the aid is provided to one student, as it was in *Zobrest*, or to several students at once, as it was in *Agostini*, "is not constitutionally significant." *Agostini*, at ___, 117 S.Ct. at 2013.

Agostini, at ___, 117 S.Ct. at 2014, citing *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). When assessing whether an aid program has the impermissible effect of advancing religion, then, the criteria by which that aid is allocated are relevant in two distinct ways: whether any use of the aid to indoctrinate religion can be attributed to the state, and, whether the criteria themselves create a financial incentive to undertake religious indoctrination. *See Agostini*, at ___, 117 S.Ct. at 2014.

The Court in *Agostini* expressly treated the "entanglement" prong (often regarded as the third prong – *see, e.g., Mueller*, 463 U.S. at 394, 103 S.Ct. 3062) of the *Lemon* test as "an aspect of the inquiry into a statute's effect." *Agostini*, at ___, 117 S.Ct. at 2015, citing *Walz v. Tax Com'n of the City of New York*, 397 U.S. 664, 674, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Court did so observing that, regardless how it had characterized the "entanglement" inquiry in prior cases, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.' " *Agostini*, at ___, 117 S.Ct. at 2015. Those factors include (1) "the character and purposes of the institutions benefited," (2) "the nature of the aid that the State provides," and, (3) "the resulting relationship between the government and religious authority." *Id.*

The Court emphasized that not every entanglement between government and religion offends the Constitution:

> Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we

> have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.

Agostini, at ___, 117 S.Ct. at 2015 (citations omitted). The *Aguilar* Court found that the Board's Title I program fostered excessive entanglement for three reasons: (1) "the program would require pervasive monitoring by public employees to ensure that Title I employees did not inculcate religion"; (2) "the program required administrative cooperation between the Board and parochial schools"; and, (3) "the program might increase the dangers of political divisiveness." *Id.*, citing *Aguilar*, 473 U.S. at 413-14, 105 S.Ct. 3232 (internal quotes omitted). The *Agostini* Court began, however, by observing that the last two grounds cannot, in and of themselves, create an excessive entanglement, since "[t]hey are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus." *Agostini*, at ___, 117 S.Ct. at 2015.

More importantly, the Court remarked that, since it had abandoned the assumption that public employees on sectarian school premises will inevitably inculcate religion,

> we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious

> institutions than the monitoring system at issue here.

Agostini, at ___, 117 S.Ct. at 2016, referring to *Bowen*, 487 U.S. at 615-17, 108 S.Ct. 2562 (emphasis added). Thus, the Court will now require evidence demonstrating the insufficiency of a particular monitoring system before it will conclude that public teachers on parochial school grounds are impermissibly inculcating religion.

The Court concluded with the following language:

> To summarize, New York City's Title I program does not run afoul of any of the three criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Agostini, at ___, 117 S.Ct. at 2016. The Court then stated its holding:

> We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

Id. (emphasis added).

2.

For our purposes, *Agostini* is as important for what it did not hold as for what it did. As the emphasized language at the end of the last section shows, *Agostini* only overruled that part of *Ball* dealing with the Shared Time program. *See also Agostini*, at ___, 117 S.Ct. at 2016 (" . . . overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions."). *Agostini* explicitly left intact that part of *Ball* which struck down the Community Education program. *See id.*; *see also Agostini*, at ___ n. 1, 117 S.Ct. at 2019 n. 1 (Souter, J., dissenting). We believe that contrasting the two programs in *Ball* will further illuminate the meaning of *Agostini*, for while the Shared Time program is constitutional under *Agostini*, presumably the Community Education program is not.

The Shared Time program offered classes during the regular schooldays that were "supplementary" to State-required core curriculum courses.[10] *See Ball*, 473 U.S. at 375, 105 S.Ct. 3216. By contrast, the Community Education program offered courses to children and adults that commenced after the regular schooldays. *Id.* at 376, 105 S.Ct. 3216.[11] Courses offered included Arts and Crafts,

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[10] For example, the Shared Time program offers courses such as "remedial" and "enrichment" mathematics, reading, art, music, and physical education. *Id.*

[11] The appeal in *Ball* "involved only Shared Time classes at the elementary level, Community Education classes at the elementary level, and the remedial mathematics Shared Time Program at the secondary level." *Id.* at 376 n. 1, 105 S.Ct. 3216.

Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation. *Id.* at 376-77, 105 S.Ct. 3216. The Court did not indicate that the Community Education courses were intended to be "supplementary" to core curriculum subjects. There was evidence that both Shared Time and Community Education courses taught at nonpublic schools were also available, perhaps in a different format, in public schools. *Id.*

The *Ball* Court noted that "[b]oth programs [were] administered similarly." *Id.* at 377, 105 S.Ct. 3216. For example, nonpublic school administrators decided which courses to offer, based on a list of courses provided by the Director of the program, a public school employee. *Id.* Nonpublic administrators also decided which classrooms would be used for the programs, subject to inspection of the facilities by the same Director. *Id.* The public school system "leased" the classrooms from the nonpublic schools for a nominal weekly charge. *Id.* The leased classrooms had to be free of any religious symbols, although religious symbols "[could] be present in the adjoining hallways, corridors, and other facilities used in connection with the program." *Id.* at 378, 105 S.Ct. 3216. The program teacher was required to post a sign outside the classroom stating that it was a "public school classroom." *Id.*

The most important difference between the two programs was the status of their teachers. *See id.* at 387, 105 S.Ct. 3216. The Shared Time teachers were "full-time employees of the public schools." *Id.* at 376, 105 S.Ct. 3216. In stark contrast,

> Community Education teachers are part-time public school employees. (. . .) Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, virtually every Community education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.

Ball, 473 U.S. at 377, 105 S.Ct. 3216 (emphasis added). While it is true that approximately 10% of the Shared Time teachers "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed," no Shared Time teachers were concurrent employees of both the nonpublic schools and the public school system. *See id.* at 376, 105 S.Ct. 3216.

Although the *Ball* majority invalidated both programs, its discussion of the Community Education program focused on the dual roles of that program's teachers:

> These [Community Education] instructors, many of whom no doubt teach in the religious school precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular schooldays to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the [Community Education] program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the

> schooldays [sic] is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes during the "official" schooldays. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

Ball, 473 U.S. at 386-87, 105 S.Ct. 3216. Given the "conflict of functions inhere[nt] in the situation," the Court found "a substantial risk that, overtly or subtly, the religious message [the teachers] are expected to convey during the regular schooldays will infuse the supposedly secular classes they teach after school." *Id.* at 387, 105 S.Ct. 3216, in part quoting *Lemon*, 403 U.S. at 618-19, 91 S.Ct. 2105. The Court was careful not to impugn the integrity of the Community Education teachers, but it nonetheless found a substantial risk of inculcation "because the pressures of the environment might alter [their] behavior from its normal course." *Ball*, 473 U.S. at 387, 105 S.Ct. 3216, citing *Wolman v. Walter*, 433 U.S. 229, 247, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

The *Ball* Court also found a "substantial risk of state-sponsored indoctrination" in the Shared Time program. *Ball*, 473 U.S. at 387, 105 S.Ct. 3216. Notably, however, the Court did so by indulging in an assumption that the *Agostini* Court has now expressly disavowed – i.e., the assumption that public employees teaching on the premises of sectarian schools "may well subtly (or overtly) conform their instruction to the environment in which they teach. . . . " *Id.* at 388, 105 S.Ct. 3216. The quoted language encapsulates what the *Agostini* court identified as the first of three now-abandoned assumptions on

which *Ball* relied. *See Agostini*, at ___, 117 S.Ct. at 2010; *see also* discussion supra Part II.C.1. By contrast, the Court invalidated the Community Education program, not because of any unfounded assumptions about public employees' behavior, but instead because of the genuine "conflict of functions" present when a teacher must fill two mutually-exclusive roles in the course of a single schoolday. *See Ball*, 473 U.S. at 387, 105 S.Ct. 3216.

A few other aspects of *Ball* bear noting. First, the Court gave no weight to whether the courses offered by either program were "supplemental." Even if the courses offered were, as a matter of fact, "supplemental" insofar as they were not then offered by the nonpublic school, the Court observed that "there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first." *Id.* at 396, 105 S.Ct. 3216. Instead of focusing on the "remedial" or "enrichment" aspects of the courses, the Court looked more broadly to their "general subject matter" (reading, mathematics, etc.), which was "surely a part of the curriculum in the past. . . . " *Id.* Thus, "the concerns of the Establishment Clause may . . . be triggered despite the 'supplemental' nature of the courses." *Id.*

Second, the Court noted that "respondents adduced no evidence of specific incidents of religious indoctrination in this case." *Id.* at 388, 105 S.Ct. 3216. Nonetheless, the Court frankly observed that "the absence of proof of specific incidents is not dispositive," because neither the religious schools nor the teachers, parents and students would have any incentive "to complain if the effect of the publicly supported instruction were to advance the

schools' sectarian mission." *Id.* at 388-89, 105 S.Ct. 3216. The Court had earlier noted that neither the Community Education nor the Shared Time program was monitored for religious content. *See id.* at 387, 105 S.Ct. 3216.

Finally, we think it especially noteworthy that Justice O'Connor (the author of *Agostini*) and (then) Chief Justice Burger dissented in *Ball*, but only as to the Shared Time program. Both invalidated the Community Education program. *See Ball*, 473 U.S. at 398, 105 S.Ct. 3216 (Burger, C.J., concurring in the judgment in part and dissenting in part), and 473 U.S. at 398-400, 105 S.Ct. 3216 (O'Connor, J., concurring in the judgment in part and dissenting in part). Because Justice O'Connor gave specific reasons for distinguishing the two programs, we reproduce here the final paragraph of her partial concurrence:

> I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly

> the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. I concur in the judgment of the Court that the Community Education program violates the Establishment Clause.

Id. at 398-400, 117 S.Ct. 1997 (O'Connor, J., concurring in the judgment in part and dissenting in part).

D.

Having in some degree clarified the legal principles governing our discussion, we now apply them to the Louisiana special education program, as administered in Jefferson Parish. Naturally, we walk within the path recently marked out in *Agostini*. At the same time, however, we are mindful that this is an area of constitutional law that is not blessed with easy answers. The most concrete tools at our disposal are the actual school aid programs the Supreme Court has either validated or invalidated. Thus, although we apply the analysis of *Agostini*, our ultimate goal is to determine whether the Louisiana special education statute is more like the constitutional aid programs approved by *Agostini* (i.e., the New York City program and the Grand Rapids Shared Time program) or more like the unconstitutional program condemned by *Ball* (the Community Education program). *See, e.g., Mueller*, 463 U.S. at 393-94, 103 S.Ct. 3062 (employing a similarly "comparative" analysis).

As we read *Agostini*, the Supreme Court has not abandoned, nor even fundamentally changed, the *Lemon* test. *See Agostini*, at ___, 117 S.Ct. at 2010 ("To be sure, the

general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided."). The first prong of *Lemon*, which asks whether a statute has a secular legislative purpose, remains unchanged. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105. The Court has, however, somewhat altered its "understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* Specifically, the Court has abandoned three of the assumptions which underlay the second ("effects") prong of *Lemon* in prior cases. *Id.*; *see also* discussion supra Part II.C.1. The Court has also expressly recognized that the third ("entanglement") prong of *Lemon* is more properly addressed as an aspect of the "effects" prong. *Agostini*, at ___, 117 S.Ct. at 2015. It thus seems that, fairly restated, the post-*Agostini Lemon* test includes the first ("secular purpose") prong plus the following, re-tooled "effects" prong:

> [T]he three criteria we currently use to evaluate whether government aid has the effect of advancing religion: [does the aid] result in governmental indoctrination[?]; [does the aid] define its recipients by reference to religion[?]; or [does the aid] create an excessive entanglement[?]

Agostini, at ___, 117 S.Ct. at 2016 (brackets added).

1.

The Supreme Court has consistently found that even those State laws that run afoul of other aspects of *Lemon* may nonetheless have a "secular legislative purpose." *See Mueller*, 463 U.S. at 394, 103 S.Ct. 3062. Following the

Court's lead, then, we will exhibit a "reluctance [in] attribut[ing] unconstitutional motives" to the State of Louisiana as we examine whether "a plausible secular purpose for the state's program may be discerned from the face of the statute." *Id.* at 394-95, 103 S.Ct. 3062.

We need not look far. The avowed purpose of the special education statute is "to assure and require that the state shall fund a program of special education and related services for the exceptional children of the state." La.Rev.Stat.Ann. § 17:1942 (West 1982). Nothing on the face of the statute belies the Legislature's purely secular aims in enacting it. Indeed, one of the public policies announced in the statute is to "prevent denials of equal educational opportunities on the basis of national origin, sex, economic status, race, religion, and physical or mental handicap or other exceptionalities in the provision of appropriate, free publicly supported education." La.Rev.Stat.Ann. § 17:1941 (West 1982) (emphasis added). We find that the equitable provision of special education services to exceptional children is a "secular legislative purpose" under *Lemon*. *See, e.g., Witters*, 474 U.S. at 485-86, 106 S.Ct. 748.

2.

The government may not participate in the indoctrination of religion, because such government activity "has the impermissible effect of advancing religion." *Agostini*, at ___, 117 S.Ct. at 2010; *see Lemon*, 403 U.S. at 612, 91 S.Ct. 2105. It is as easy to agree with such a proposition in the abstract as it is difficult to apply it to a particular governmental program. The *Lemon* Court itself

remarked that "the line of separation [between church and state], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614, 91 S.Ct. 2105.

a.

Regarding indoctrination, *Agostini* first instructs us that the mere presence of a publicly paid teacher on sectarian school premises will no longer give rise to the presumption that those teachers will inculcate religion in their students. *See Agostini*, at ___, 117 S.Ct. at 2011. The record in this case discloses no evidence whatsoever that any of the special education teachers at the eight Jefferson Parish parochial schools have ever attempted to indoctrinate their students. The special education teachers are bound by law to teach only what is included in a student's IEP, and an IEP cannot describe religious instruction. We will not presume that qualified, conscientious state employees are violating the law.

The employment status of these special education teachers falls somewhere between the Title I instructors in *Agostini* and the Community Education teachers in *Ball*. The Jefferson Parish special education teachers are full-time public employees who are not concurrently employed by the parochial schools where they work. Thus, they do not suffer from the "conflict of functions" present in the Community Education teachers in *Ball*. *See Ball*, 473 U.S. at 387, 105 S.Ct. 3216. Unlike the *Agostini* teachers, however, the Jefferson Parish teachers are, in a

sense, "permanently" assigned to their respective parochial schools under the terms of the Collective Bargaining Agreement. The Jefferson Parish teachers do not move from school to school, as the *Agostini* teachers do, and many of the Jefferson Parish teachers share the religious affiliation of their schools. *See Agostini*, at ___, 117 S.Ct. at 2004. We observe, however, that the Shared Time teachers in *Ball* were, in a significant number of cases, former employees of the schools at which they subsequently worked as State-paid teachers. *See Ball*, 473 U.S. at 376, 105 S.Ct. 3216.

Naturally, the Jefferson Parish special education teachers have frequent contacts with their fellow sectarian teachers and the sectarian principals. The special education teacher may even consider him or herself an informal member of the parochial faculty, as evidenced by the fact that special education teachers attend monthly faculty meetings. But, while admitting that we strike a fine balance, we do not find that the Jefferson Parish special education teachers labor under the same, irreconcilable "conflict of functions" that spelled doom for the Community Education program in *Ball, supra*. The Jefferson Parish teachers are simply not asked to act in the capacity of a "religious school" teacher during one part of the day, and then to assume the purely secular role of a publicly-funded special education teacher during another.

We are somewhat troubled by the evidence indicating that the special education teachers are monitored by both public and sectarian entities. The record shows that special education teachers are subject to infrequent visits by state personnel and are otherwise subject to the regular,

albeit non-personal, supervision of state IEP specialists. The record also shows, however, that SESC executive director Janz as well as the parochial school principals exercise some level of supervision over the special education teachers.

If the State delegated its supervisory authority over the special education program to the sectarian schools themselves, or to a sectarian institution such as the SESC, then the program might not withstand scrutiny under the Establishment Clause. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 252-55, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). We are not persuaded, however, that the State has abdicated its review of the substance of the special education instruction to the sectarian institutions. While the record does show limited supervision of the teachers by the SESC and the parochial school principals, that supervision seems more related to administrative matters than to assuring that the special education teachers do not impart religion to the students. The State, through its monitoring visits and through the IEP process, has retained sufficient authority over the substantive aspects of the special education instruction.

Agostini also instructs us that the mere presence of a publicly-paid teacher on religious school premises will no longer "create[ ] an impermissible 'symbolic link' between government and religion." *Agostini*, at ___, 117 S.Ct. at 2011. We need not long belabor this point, because the record discloses no evidence that the special education program has done anything more than place its

teachers on sectarian school premises.[12] The fact that many of the teachers were formerly employed by the same schools is insufficient to create a "symbolic link" between church and state, given that many of the Shared Time teachers in *Ball* shared a similar employment history. *See Ball*, 473 U.S. at 376, 105 S.Ct. 3216. Our view is not altered by the fact that the special education teachers have limited "administrative ties" to the parochial schools – i.e., they attend monthly faculty meetings; they can be assigned bus duty or lunch duty; etc. If the Supreme Court found it neither "sensible" nor "sound" to make a program's constitutionality depend on where services were provided, we find it equally nonsensical and unsound to make its constitutionality turn on whether state-paid teachers attend faculty meetings or perform lunch duty. *See Agostini*, at ___, 117 S.Ct. at 2012.

Finally, *Agostini* informs us that not every form of government aid that "directly aids the educational function of religious schools is invalid." *Id.* at ___, 117 S.Ct. at 2011. In distinguishing between valid and invalid direct aid, we look, per *Agostini*, to the criteria for distributing the aid and for identifying its beneficiaries, the means by

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[12] While we certainly do not place our imprimatur on the presence of religious symbols in state-funded special education classrooms, the evidence indicating the presence, in one instance, of a crucifix in a classroom is insufficient to show that the Jefferson Parish special education program has created a "symbolic link" between church and state. Other evidence indicates that program monitors would remove such a symbol if they found it in a classroom, even though the State of Louisiana does not have an articulated policy requiring inspection for, and removal of, religious symbols from public classrooms.

which any of the aid might potentially benefit religious schools, and whether the aid "relieve[s] sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at ___, 117 S.Ct. at 2012, *citing Zobrest*, 509 U.S. at 12, 113 S.Ct. 2462. As discussed before, the district court found that State funds are awarded to Jefferson Parish based on the number of exceptional students there. *See* discussion *supra* Part II.A. Whether or not a student qualifies as "exceptional" depends on entirely secular statutory criteria. *See supra* note 2; *see also* La.Rev.Stat.Ann. § 1943(2) (West Supp.1998). Thus, the statutory scheme implementing the special education program shows that any aid is "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." *Agostini*, at ___, 117 S.Ct. at 2011, *quoting Witters*, 474 U.S. at 487, 106 S.Ct. 748.

Agostini seemed to require that "any money that ultimately went to [the sectarian schools] 'did so only as a result of the genuinely independent and private choices of' individuals." *Agostini*, at ___-___, 117 S.Ct. at 2011-12, *quoting Witters*, 474 U.S. at 487, 106 S.Ct. 748; *see also Zobrest*, 509 U.S. at 9, 113 S.Ct. 2462. Relative to this requirement, the Court instructs us to examine the criteria by which the challenged program selects its recipients. *Agostini*, at ___, 117 S.Ct. at 2012. As we observed above, the Louisiana special education program selects its recipients based solely on the "exceptionality" of a particular student and on the number of exceptional students enrolled in a given school district. The fact that a particular exceptional student is enrolled in a particular school, be it sectarian or nonsectarian, results from a parental

and not a governmental decision. Thus, any aid flowing incidentally to a sectarian school occurs "only as a result of the genuinely independent and private choices of" those students' parents. *See Zobrest*, 509 U.S. at 9, 113 S.Ct. 2462.

Finally, *Agostini* mandates that any incidental benefits accruing to the sectarian schools as a result of the program cannot relieve the schools of costs they "otherwise would have borne in educating [their] students." *Agostini*, at ___, 117 S.Ct. at 2012. Failure to meet this requirement presupposes that the Jefferson Parish sectarian schools, in the absence of the special education program, would have "otherwise borne" the costs of providing special education services to their exceptional students. But only the State, and not the sectarian schools, has the legal duty to "provide an appropriate, free, publicly supported education to every exceptional child" residing in Louisiana. *See* La.Rev.Stat.Ann. § 17:1941 (West 1982). Since the sectarian schools are not required to provide such an education, we fail to see how the State's fulfilling its statutory obligation to do so relieves private schools of any burden at all. This case does not present the situation where the State furnishes aid which alleviates a private school's legal duty to provide, for example, a state-mandated core curriculum to its students. *Cf. Ball*, 473 U.S. at 396-97, 105 S.Ct. 3216.

The district court made much of its conclusion that the sectarian schools receive a "direct economic benefit" as a result of the special education program, in the form of a student's tuition and the surcharge paid by parents to supplement the special education teachers' salaries. *See Helms*, 856 F.Supp. at 1117-18; *see also* discussion *supra*

Part II.A. But to view the students' tuition as an "economic benefit" requires the assumptions that "the school makes a profit on each student; that, without the [special education program], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot." *Zobrest*, 509 U.S. at 10-11, 113 S.Ct. 2462. The Supreme Court was unwilling to make such assumptions and regard the deaf student's tuition as an "economic benefit" in *Zobrest*. *See id.* Given the Court's close reliance on *Zobrest* in *Agostini*, we are likewise unwilling to make them. *See Agostini*, at ___, 117 S.Ct. at 2012 ("In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA."), *citing Zobrest*, 509 U.S. at 12, 113 S.Ct. 2462.

Additionally, the surcharge required of parochial school parents is merely intended to equalize the salaries of special education teachers working in nonpublic schools to those of special education teachers working in public schools. *See Helms*, 856 F.Supp. at 1110, 1117.[13] We do not view the receipt of such a surcharge from parents as any kind of "economic benefit" to the sectarian schools. The record indicates that the surcharges are paid into accounts earmarked for "special education expenses" and are used exclusively to supplement the salaries of special education teachers. *Id.* at 1117. The district court thus erred when it considered this surcharge a "direct economic benefit" to the parochial schools. Indeed, there is no discernible "benefit" flowing to the schools from the

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[13] In the public schools, this surcharge is paid by the JPSB. *Id.* at 1110; *see* discussion *supra* Part II.A.

surcharge; rather, the surcharge represents an economic burden imposed on the parents of parochial school children who wish to secure special education services for their children. The surcharge never reaches, in any meaningful way, the general coffers of the parochial schools.

b.

We need not long consider whether the criteria by which the special education program selects its beneficiaries "create a financial incentive to undertake religious indoctrination." *Agostini*, at ___, 117 S.Ct. at 2014. We have already observed, in Part II.D.2.a, *supra*, that the Louisiana special education program selects its aid beneficiaries based on neutral, secular criteria: the exceptionality of the child and the number of exceptional students enrolled in Jefferson Parish and in its individual school districts. These are "neutral, secular criteria that neither favor nor disfavor religion, and [the aid] is [therefore] made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, at ___, 117 S.Ct. at 2014. The Louisiana program does not "define its recipients with reference to religion" and therefore creates no financial incentive to undertake religious instruction. *Id.* at ___, 117 S.Ct. at 2016. Indeed, as the district court stated:

> The Court finds that there was no financial incentive for the parents of special education students to choose a nonpublic school. In fact, it is undisputed that the students would have received special education at no cost in the public schools. Indeed, the parents of special education students elected to pay an extra charge, in

addition to the regular tuition, in order for their children to attend a parochial school.

Helms, 856 F.Supp. at 1117.

c.

We likewise discern no "excessive entanglement" created or necessitated by the special education program. Now that the Supreme Court has discarded the presumption that publicly-paid teachers on sectarian school premises will inculcate religion, also relegated to the dustbin is the "assumption that pervasive monitoring of [those teachers] is required." *Agostini*, at ___, 117 S.Ct. at 2016. We have not been shown any evidence demonstrating that the monitoring already in place is "insufficient to prevent or to detect inculcation." *Id.* The district court specifically noted that "[t]he JPPSS special education teachers at nonpublic schools do not teach religion" and that "[t]he special education classrooms are used only for special education instruction." *Helms*, 856 F.Supp. at 1114. We see no reason to disturb those findings.

E.

In sum, we find that the Louisiana special education program, codified at La.Rev.Stat.Ann. § 17:1941-1956 (West 1982 & West Supp.1998), does not offend the Establishment Clause because (1) the statute has a secular legislative purpose, and (2) the statute does not have the effect of advancing religion. *See Agostini*, at ___, 117 S.Ct.

at 2016. We therefore REVERSE the judgment of the district court and RENDER judgment declaring the Louisiana special education program constitutional as applied in Jefferson Parish.

III.

Plaintiffs also claim that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("Chapter 2")[14] and its Louisiana counterpart, La.Rev.Stat.Ann. § 17:351-52 (West 1982 & West Supp.1998), violate the Establishment Clause as applied in Jefferson Parish insofar as they provide direct aid to sectarian schools in the form of educational and instructional materials. Initially, the district court agreed and granted Plaintiffs' motion for summary judgment, finding that the loan of state-owned instructional materials (such as slide projectors, television sets, tape recorders, maps, globes, computers, etc.) to pervasively sectarian institutions had the "primary effect of providing a direct and substantial advancement to the sectarian enterprise" and therefore violated the Establishment Clause. The court relied primarily on *Wolman v. Walter*, 433 U.S. 229, 250, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), and *Meek v. Pittenger*, 421 U.S. 349, 363, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

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[14] On October 20, 1994, Congress enacted the Improving America's School Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labeled "Subchapter VI – Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373 (West Supp.1998). For ease of reference, we will continue to refer to new Subchapter VI as "Chapter 2." We will cite individual sections, however, by reference to citations in the current United States Code.

When the case was reassigned due to Judge Frederick Heebe's retirement, Judge Marcel Livaudais granted Defendants' motion to reconsider the court's ruling. Following the reasoning of the Ninth Circuit in *Walker v. San Francisco Unified School District*, 46 F.3d 1449, 1463-70 (1995), Judge Livaudais found that the reasoning in *Meek* and *Wolman, supra*, had been undermined by subsequent Supreme Court cases. He therefore reversed Judge Heebe's finding of unconstitutionality and granted Defendants' motion for summary judgment, declaring Chapter 2 and La.Rev.Stat.Ann. § 17:351-52 constitutional, facially and as applied in Jefferson Parish.

A.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement eight "innovative assistance programs." *See* 20 U.S.C. §§ 7311(b); 7312(a), (c)(1); 7351. The challenged innovative assistance program describes

> programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program.

20 U.S.C. § 7351(b)(2).

Chapter 2 services are to be provided to children enrolled in both "public and private, nonprofit schools."

20 U.S.C. § 7312. Section 7372 provides that a local educational agency shall equitably provide "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools within its boundaries. 20 U.S.C. § 7372(a)(1). Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, "funds from non-Federal sources." 20 U.S.C. § 7371(b). The control of Chapter 2 funds, as well as title to all Chapter 2 "materials, equipment, and property," must be in a public agency, "and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Once Louisiana receives its Chapter 2 funds from the Federal government, the designated State Educational Agency ("SEA") allocates 80 percent of the funds to Local Educational Agencies ("LEAs"). Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and private, nonprofit schools; 15% go to LEAs based on the number of children from low-income families. *See* 20 U.S.C. § 7312(a). During the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds; about 70% of those funds were allocated to public schools and about 30% to nonpublic schools.

In 1984, the State instituted a monitoring process to ensure that Chapter 2 materials were not being used for religious purposes. Nonpublic schools were encouraged

but not required to sign assurances that they would only use loaned materials for secular purposes. Additionally, LEAs made monitoring visits to nonpublic schools, and the State made monitoring visits to the LEAs and to some nonpublic schools. After the United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program in September, 1984, the Louisiana Department of Education made changes in monitoring LEAs. It increased, for example, the frequency of on-site visits by the Chapter 2 staff to LEAs from once every three years to once every two years.

The State also began reviewing the LEAs' monitoring process of the private schools. LEAs, however, have primary responsibility in Louisiana for monitoring their Chapter 2 programs and for compliance with all applicable State and Federal guidelines. When State Chapter 2 monitors visited the JPPSS in April, 1985, the monitors found that "the services, materials, equipment, [and] other benefits provided to nonpublic schools" in Jefferson Parish were not "neutral, secular and non-ideological."

A report of that evaluation prepared by the Bureau of Evaluation indicates that, while the LEAs "handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another." The report also states that "[e]xcept that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed." During the 1986-87 fiscal year, for example, of the total amount of Chapter 2 funds budgeted for

nonpublic schools ($214,080), $94,758 was spent to provide library/media materials, $102,862 was spent for instructional equipment, and $16,460 was spent for "local improvement programs."

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, stated that library books are ordered for nonpublic schools, but not for public schools. Such library books are stamped "ECIA Chapter 2." Woodward reviews the titles of books and other Chapter 2 materials and deletes titles she finds inappropriate. After reviewing library book orders from 1982, Woodward discovered approximately 191 titles in violation of Chapter 2 guidelines and had the books recalled and donated to the public library.

Woodward also stated that she generally makes a single visit to a given nonpublic school during the year. During her monitoring visits, she stated that she has "normally" found that the Chapter 2 materials and equipment are used in accordance with Chapter 2 guidelines. A review of the instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools reveals the following kinds of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. Woodward stated that no direct payments of Chapter 2 funds are ever made to nonpublic schools; the funds are retained and administered by her office.

The Louisiana counterpart to Chapter 2, LA.REV. STAT.ANN. § 17:351-52 (West 1982 & West Supp.1998), requires the State Board of Elementary and Secondary

Education to "prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of [Louisiana] at the elementary and secondary levels. . . . " La.Rev.Stat.Ann. § 17:351(A)(1) (West Supp.1998). The statute also requires that the Board, or the State Department of Education, ensure that any books or instructional materials provided "are thoroughly screened, reviewed, and approved as to their content. . . . " La.Rev.Stat.Ann. § 17:352(A)(1) (West Supp.1998).[15] Judge Livaudais noted that an "overwhelming portion" of funds allocated under the Louisiana statute are used to purchase textbooks, and that Plaintiffs have not challenged this application of the statute.

Deposition testimony indicated that library reference books purchased pursuant to La.Rev.Stat.Ann. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary and Secondary Education. Additionally, books and instructional materials may only be ordered from state-approved lists and sources.

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[15] An additional section, creating a "Teacher Supplies Fund," became effective June 30, 1997, after Judge Livaudais granted Defendants' motion for summary judgment. *See* La.Rev.Stat.Ann. § 17:354 (West Supp.1998), added by Acts 1997, No. 473, § 1, eff. June 30, 1997. Section 354 is not at issue in this appeal, but we note in passing that it provides, *inter alia*, State funds "for the purchase and loan of teaching materials and supplies" to nonpublic schools, under constraints similar to those in Chapter 2.

B.

We will focus on the Ninth Circuit's decision in *Walker, supra,* because Judge Livaudais relied heavily on its reasoning and also because it is the only other Circuit decision to have addressed the constitutionality of Chapter 2.

In *Walker,* a panel of the Ninth Circuit confronted a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish.[16] The most significant aspect of the *Walker* panel's reasoning is devoted to assessing whether Chapter 2 has a "primary or principal effect of advancing religion."[17] *Walker,* 46 F.3d at 1464-69. The panel began by observing that, with the cases of *Meek, Wolman and Board of Education v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), the Supreme Court "drew a [constitutional] distinction between providing textbooks and providing other instructional materials – such as maps, overhead projectors, and lab equipment – to parochial schools or their students." *Walker,* 46 F.3d at 1464-65; *see Allen,* 392 U.S. at 248, 88 S.Ct. 1923; *Meek,* 421 U.S. at 362-63, 95 S.Ct. 1753;

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[16] Aside from the identical statutory provision governing the *Walker* program, the percentage distribution of Chapter 2 funds for the 1988-89 school year were substantially similar to figures for the Jefferson Parish program: 74% of Chapter 2 benefits to public schools and 26% to private schools in *Walker,* compared to, *e.g.,* a 70%/30% split in Jefferson Parish during the 1984-85 school year.

[17] The panel easily concluded that Chapter 2 has the valid secular purpose of "improv[ing] education." *Walker,* 46 F.3d at 1464, *citing Meek,* 421 U.S. at 363, 95 S.Ct. 1753.

Wolman, 433 U.S. at 237, 97 S.Ct. 2593. The panel, however, was not convinced that such a distinction was still the law. In its view, subsequent Supreme Court cases – particularly, *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980), *Ball*, *supra*, and *Zobrest*, *supra* – had "clarified the holdings of *Meek* and *Wolman*, and rendered untenable the thin distinction between textbooks and other instructional materials." *Walker*, 46 F.3d at 1465. The Ninth Circuit thus held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." *Id.*

The panel read *Meek* as an illogical departure from *Allen*, which had upheld a law requiring public school authorities to lend textbooks, free of charge, to both public and private school students. *Allen*, 392 U.S. at 248, 88 S.Ct. 1923. The panel pointed out that "*Allen* . . . rests on the robust principle that 'the Establishment Clause does not prohibit a State from extending the benefits of state laws to all citizens without regard for their religious affiliation.' " *Walker*, 46 F.3d at 1465, *quoting Allen*, 392 U.S. at 242, 88 S.Ct. 1923. In the panel's view, however, the Court's subsequent decision in *Meek* departed from *Allen*'s reliance on neutrality when *Meek* "upheld the provision of textbooks to parochial school students, but struck down the program which loaned instructional materials and equipment. . . . " *Walker*, 46 F.3d at 1465 (citations omitted); *see Meek*, 421 U.S. at 362, 365-66, 95 S.Ct. 1753.

Even though the Court's subsequent decision in *Wolman* explicitly upheld *Meek*, the *Walker* panel believed

that "[i]n reaffirming *Meek*'s holding . . . *Wolman* undermined *Meek*'s rationale." *Walker*, 46 F.3d at 1465; *see Wolman*, 433 U.S. at 238 (upholding *Meek* and *Allen*). Specifically, the panel concluded that *Wolman* had "eviscerated" *Meek*'s premise that "any state aid to the educational functions of a sectarian school is forbidden." *Walker*, 46 F.3d at 1465. *Wolman* did so, the panel reasoned, by "holding as constitutional a statute under which the State prepared and graded tests in secular subjects" for both public and private, parochial schools. *Id.* Thus, the *Walker* panel announced that the paltry sum of *Meek* and *Wolman* was

> the thin distinction – unmoored from any Establishment Clause principles – that state loans to parochial schools of instructional materials and equipment impermissibly advances religion, but state preparation and grading of tests and state loans of textbooks do not.

Walker, 46 F.3d at 1466.

In the panel's estimation, the true death-blow to *Meek*'s textbooks vs. other instructional materials dichotomy came three years later in *Regan*, which "recognized this weak distinction and clarified that the provision of instructional materials and equipment to parochial schools is not always prohibited." *Walker*, 46 F.3d at 1466. But, as the panel recognized in the next sentence, *Regan* merely reaffirmed *Wolman* by "uph[olding] a law reimbursing parochial schools for the costs of administering tests required by the State." *Id.*; *see Regan*, 444 U.S. at 655, 100 S.Ct. 840 ("We agree with the District Court that *Wolman* controls this case."). Although *Regan* did not deal with the provision of instructional materials to parochial

schools, and although *Regan* explicitly followed *Wolman* and said nothing about overruling *Meek*, the *Walker* panel nonetheless declared with perfect candor that

> *Regan* thus instructs us that the difference between textbooks and other instructional equipment and materials, such as science kits and maps, is not of constitutional significance.

Walker, 46 F.3d at 1466. In our view, such a statement could only mean that the panel thought *Regan* silently overruled *Meek*.

The *Walker* panel thus adopted an Establishment Clause analysis based on what it identified as "the underlying principle animating Establishment Clause jurisprudence: government neutrality towards religion." *Id.* at 1466, *citing, inter alia, Zobrest*, 509 U.S. at 10, 113 S.Ct. 2462. The panel stated its "test" as follows:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state.

Walker, 46 F.3d at 1467. Applying its test, the panel easily found that Chapter 2 passed constitutional muster. First, it found that Chapter 2 benefits were "neutrally available without regard to religion" given that "an overwhelming percentage of beneficiaries [were] nonparochial schools and their students." *Id.*[18] Second, the panel found that the

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[18] The panel also found that, given the de minimis aid provided per student ($6.65 per student in 1988-89), "it is no

constraints under which Chapter 2 services were provided "adequately safeguard[ed] Chapter 2 benefits from improper diversion to religious use." *Id.* at 1467-68. Finally, the panel reasoned that, if the state-paid interpreter on sectarian school premises in *Zobrest* did not create a symbolic union between government and religion, then "certainly having religiously neutral material and equipment in the same classroom does not create a symbolic union either." *Id.* at 1468, *citing Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462.

Although it had already established (to its own satisfaction) that *Meek* and *Wolman* were no longer good law, the panel went on to distinguish the aid programs in those cases from Chapter 2:

> [T]he statutes struck down in *Meek* and *Wolman* are fundamentally different from the Chapter 2 statute at issue here. The statute in *Meek* was not neutral because it provided close to $12 million in aid that was targeted directly at private schools, of which more than 75% were church-related. Similarly, in *Wolman*, the statute was not neutral because it provided $88.8 million in aid that was targeted directly at private schools, of which 96% were church-related and 92% were Catholic. Here, seventy-four percent of Chapter 2 benefits went to public schools. Of the remaining twenty-six percent . . . a substantial portion was allocated to nonreligious private schools. Indeed, over thirty percent of the private

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surprise that Chapter 2 funds are supplementary and cannot supplant the basic educational services of the religious schools." *Id.*

> schools under the Chapter 2 program are nonreligious. Thus, unlike the statutes in *Meek* and *Wolman*, Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools.

Walker, 46 F.3d at 1468.[19]

The *Walker* panel decision was not without its detractors, however. While Judge Fernandez agreed with the panel majority that the distinction drawn in *Meek* between textbooks and educational materials was "untenable," he nevertheless believed that *Meek* was still binding law. *See Walker*, 46 F.3d at 1470 (Fernandez, J., concurring and dissenting) ("[The Supreme] Court has given us the book-for-kids versus materials-for-schools dichotomy. Only it can take it away."). Additionally, the Ninth Circuit's refusal to rehear the case en banc provoked a vituperative dissent by Judge Reinhardt (joined by Judges Pregerson and Hawkins). Judge Reinhardt excoriated the panel majority for shirking its "clear duty to invalidate the San Francisco Unified School District's provision of videos, overhead projectors, televisions, record players, and similar equipment to parochial schools." *Walker v. San Francisco Unified School District*, 62 F.3d 300, 301 (1995) (Reinhardt, J., dissenting from denial

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[19] The panel also found that Chapter 2 did not violate the "entanglement" prong of *Lemon*, given the minimal intrusion onto the parochial schools premises by State monitors, and also given the "self-policing" nature of the neutral instructional materials and equipment. *Walker*, 46 F.3d at 1469, *citing, inter alia, Meek*, 421 U.S. at 365, 95 S.Ct. 1753, and *Zobrest*, 509 U.S. at 13-14.

of en banc rehearing). Judge Reinhardt repeatedly emphasized that *Meek* and *Wolman* were still binding precedent and that "[t]he distinction between textbooks and other educational materials is so clear and well-established as to defy legitimate judicial evasion." *Id.*

C.

When we carefully review the Supreme Court's pronouncements in *Allen, Meek, Wolman,* and *Regan,* it is tempting to complain that the high Court has instructed us confusingly. As merely one example, the Court in *Allen* registered its disagreement with the proposition "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen,* 392 U.S. at 248, 88 S.Ct. 1923. Only seven years later, however, the Court was heard to say in *Meek* that "[t]he secular education [that parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Meek,* 421 U.S. at 366, 95 S.Ct. 1753, *quoting Lemon,* 403 U.S. at 657, 91 S.Ct. 2105 (opinion of Brennan, J.) (emphasis added). Lest we fall into despair, however, we will view the Court's cases dealing with state aid to religious schools more in terms of what they did rather than what they said.

When we take that approach, the solution becomes compellingly clear and simple. *Meek* and *Wolman* have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do. No case has

struck down *Meek* or *Wolman*. We could take out our judicial divining rod and try to predict, on the basis of what has been said since *Meek* and *Wolman*, what the present Court would do if called upon to weigh the constitutionality of Chapter 2. But such a course would, we think, take us beyond our role as a Circuit Court of Appeals, bound to follow the dictates of the Supreme Court. And if our duty were not already clear enough, the Court has recently reminded us of it in *Agostini*:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, at ___, 117 S.Ct. at 2017, *quoting Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (emphasis added).

Meek invalidated a Pennsylvania statute that authorized the Secretary of Education to lend to parochial schools "instructional materials" which included "periodicals, photographs, maps, charts, sound recordings, films, . . . projection equipment, recording equipment, and laboratory equipment." *Meek*, 421 U.S. at 354-55, 366, 95 S.Ct. 1753; *see also Meek*, 421 U.S. at 354 n. 4, 95 S.Ct. 1753 (complete statutory definition of "instructional materials."). *Meek* is directly on point and has not been overruled by any Supreme Court case. We thus "follow

the case that directly controls." *See Agostini*, at ___, 117 S.Ct. at 2017.

In *Allen*, *Meek*, *Wolman*, and *Regan*, the Court drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself. *Allen* approved textbook loans to parochial schools because the evidence did not indicate that "all textbooks . . . are used by the parochial schools to teach religion." *Allen*, 392 U.S. at 248, 88 S.Ct. 1923. While recognizing that books, if they were religious books, could have the effect of indoctrination, the *Allen* Court likened the purely secular books at issue there to the bus transportation subsidized in *Everson v. Board of Education*, 330 U.S. 1, 17, 67 S.Ct. 504, 91 L.Ed. 711 (1947): neither bus rides nor purely secular textbooks had "inherent religious significance." *Allen*, 392 U.S. at 244, 88 S.Ct. 1923. While Justices Black and Douglas dissented in *Allen*, they did so based on a different conception of the role of textbooks in parochial schools. *See Allen*, 392 U.S. at 252, 88 S.Ct. 1923 (Black, J., dissenting) ("Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."), and *Allen*, 392 U.S. at 257, 88 S.Ct. 1923 (Douglas, J., dissenting) ("The textbook goes to the very heart of the education in a parochial school."). Both the majority and the dissenting opinions, however, consistently focused on the character of the aid given to parochial schools.

Meek and *Wolman*, while both reaffirming *Allen*, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren. *Meek* merely intimated that the character

of the aid was the determinative feature in its holding. *See Meek*, 421 U.S. at 364, 95 S.Ct. 1753 ("[A] State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities – secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school.") (emphasis added). But *Wolman* clarified that, in the Court's view, the character of the aid itself determined whether the aid was constitutional. *Wolman* did so by upholding several different types of aid (textbooks, administration of state-required standardized tests, speech/hearing diagnostic services, off-premises therapeutic/guidance/remedial services), while at the same time striking down, based on *Meek*, the loan of instructional materials to parochial schoolchildren. *See Wolman*, 433 U.S. at 236-38, 238-41, 241-244, 244-248, 248-252, 97 S.Ct. 2593. The *Wolman* Court distinguished among these various types of aid by reference to the particular attributes of the aid itself. *See, e.g., Wolman*, 433 U.S. at 244, 97 S.Ct. 2593 ("[D]iagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school."). *Wolman* candidly recognized the "tension" existing between the holdings in *Meek* and *Allen* and sought to resolve that tension by emphasizing the unique character of the aid approved in *Allen*, *i.e.*, that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." *See Wolman*, 433 U.S. at 251 n. 18, 97 S.Ct. 2593; *see also Committee for Public Education v. Nyquist*, 413 U.S. 756, 781-82, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

Contrary to the *Walker* panel's view, *Regan* did nothing to "instruct us that the difference between textbooks and other instructional equipment and materials . . . is not of constitutional significance." *Walker*, 46 F.3d at 1466. *Regan* did exactly the opposite. In seeking to harmonize the holdings of *Meek* and *Wolman*, the *Regan* Court merely observed that *Meek* did not forbid all types of aid to sectarian schools. *See Regan*, 444 U.S. at 661, 100 S.Ct. 840. Indeed, as the *Regan* Court realized, if *Meek* stood for such a proposition, then *Wolman's* approval of, for example, the testing and grading services would have flown in the face of precedent. *See id. Regan* clarified that *Meek* only invalidates a particular kind of aid to parochial schools – the loan of instructional materials. *See id.* at 662, 100 S.Ct. 840.

The *Walker* panel made a flawed attempt to avoid the holdings of *Meek* and *Wolman* by "distinguishing" the statutes at issue in those cases from the Chapter 2 program. The panel opined that the *Meek* and *Wolman* statutes were "fundamentally different" from Chapter 2 because they were not "neutral." *Walker*, 46 F.3d at 1468. By this, the panel meant that the challenged programs in *Meek* and *Wolman* directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated. *See id.* By contrast, the panel distinguished Chapter 2 as a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." *Id.* But *Walker* misunderstood the aid programs struck down in *Meek* and *Wolman*.

Those cases dealt with general aid programs designed to provide equitable benefits to both public and

nonpublic schoolchildren. *See Meek*, 421 U.S. at 351-52, 95 S.Ct. 1753 ("With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools, the Pennsylvania General Assembly in 1972 added Acts 194 and 195 to the Pennsylvania Public School Code of 1949.") (citations omitted) (emphasis added), and *Wolman*, 433 U.S. at 234, 97 S.Ct. 2593 ("All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in public schools.") (emphasis added). The *Meek* and *Wolman* Courts, however, dedicated their discussion to those parts of the programs that channeled aid to nonpublic schools, because it was the character of the aid provided to those schools, and not the relative percentages of aid distributed between public and nonpublic schools, that was determinative. *See Walker*, 62 F.3d at 302 n. 1 (Reinhardt, J., dissenting from denial of en banc rehearing). Thus, the percentages discussed in *Meek* and *Wolman* were completely irrelevant to the constitutionality of the programs at issue there, as was the fact that the general aid programs might have been implemented by two separate statutes. The Court observed in *Meek*, in a different context, that "it is of no constitutional significance whether the general program is codified in one statute or two." *Meek*, 421 U.S. at 360 n. 8, 95 S.Ct. 1753.

Since *Walker* was decided before the Supreme Court handed down *Agostini*, we should add that *Agostini* also

does not overrule *Meek* or *Wolman*; nor does *Agostini* dismantle the distinction between textbooks and other educational materials. In fact, *Agostini* does not even address that issue. *Agostini* does, it is true, discard a premise on which *Meek* relied – *i.e.*, that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian school enterprise as a whole." *Meek*, 421 U.S. at 366, 95 S.Ct. 1753 (emphasis added). But *Agostini* does not replace that assumption with the opposite assumption; instead, *Agostini* only goes so far as to "depart[ ] from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, at ___, 117 S.Ct. at 2011 (emphasis added). *Agostini* holds only that the aid at issue there (*i.e.*, the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion. *Id.* at ___, 117 S.Ct. at 2016. *Agostini* says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling *Meek* or *Wolman*. *Agostini* only instructs us that *Meek*'s presumption regarding instructional materials should not be applied to state-paid teachers on parochial schools premises. *See Agostini*, at ___, 117 S.Ct. at 2012; *see also Ball*, 473 U.S. at 395-96, 105 S.Ct. 3216 (applying *Meek* and *Wolman* to state-paid teachers).

D.

Applying *Meek* and *Wolman*, we hold that Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52 (West 1982 & West

Supp.1998), are unconstitutional as applied in Jefferson Parish, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools. By prohibiting the loaning of such materials, our decree encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. *See, e.g., Meek*, 421 U.S. at 354 n. 4, 95 S.Ct. 1753. Our decree also necessarily prohibits the furnishing of library books by the State, even from prescreened lists. We can see no way to distinguish library books from the "periodicals . . . maps, charts, sound recordings, films, or any other[ ] printed and published materials of a similar nature" prohibited by *Meek*. *See id.* at 355, 95 S.Ct. 1753 (internal quotes omitted). The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term "textbook" has generally been defined by the case law as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends." *Allen*, 392 U.S. at 239 n. 1, 88 S.Ct. 1923. We do not think library books can be subsumed within that definition.

We therefore REVERSE Judge Livaudais' grant of summary judgment in favor of Defendants and RENDER judgment declaring Chapter 2, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52, unconstitutional as applied in Jefferson Parish.

IV.

Plaintiffs also challenge an agreement between the JPSB and the Jefferson Non-Public School Transportation Corporation (the "Corporation") entered into pursuant to La.Rev.Stat.Ann. § 17:158 (West 1982 & West Supp.1998), under which the JPSB makes payments to the Corporation, which in turn arranges transportation for students to six parochial schools in Jefferson Parish. Plaintiffs argue that the agreement impermissibly delegates civil authority to a group (the Corporation) dedicated to serving religious interests, in violation of the Establishment Clause, and furthermore that the agreement violates the neutrality requirements of the Establishment Clause by privileging six sectarian schools over other public and nonpublic schools. The district court, after a bench trial, disagreed, finding the arrangement constitutionally indistinguishable from the arrangement upheld in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). *See generally, Helms*, 856 F.Supp. at 1133-55.

A.

Louisiana law requires that "each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school." La.Rev.Stat.Ann. § 17:158(A)(1) (West Supp.1998). A subsection of the same statute provides that "nothing . . . shall prohibit a parish or city school

from entering into contracts or mutual agreements for providing school bus transportation." La.Rev.Stat.Ann. § 17:158(A)(4) (West Supp.1998). The JPPSS provides free transportation to eligible public and nonpublic school students. Since 1988, nonpublic and public student bus transportation has been funded through separate appropriations of state funds. Bus drivers are paid through a combination of state funds and local supplements.

During the 1988-89 school year, funding reductions for Jefferson Parish nonpublic school transportation caused the JPSB to cut local supplements for nonpublic schools. To make up for the shortfall, the Archdiocese of New Orleans agreed to contribute funds and thereby ensure the restoration of certain Catholic, nonpublic schools' transportation services to the prior year's level. Parents of schoolchildren at those nonpublic schools were thereafter required to pay a supplement to offset transportation costs. Nevertheless, the JPSB discontinued some of the nonpublic school transportation in May 1988, because JPSB had not received all of the necessary funds from those nonpublic schools.

In 1989, the State increased nonpublic school transportation funding to Jefferson Parish by $278,788, for a total of $1,490,637. The Archdiocese of New Orleans and the State decided that part of these additional funds would be used to provide privately contracted bus service for those students who had been eliminated from the transportation plan. Consequently, the Jefferson Non-Public School Transportation Corporation was formed on September 28, 1989. The stated purposes of this non-profit Corporation included

> [the provision of] transportation for the children of parents residing in the Parish of Jefferson who have enrolled their children in parochial schools within the Parish of Jefferson other than their own church parish because of the fact that the parish in which said parents reside does not operate a parochial school. . . .

Helms, 856 F.Supp. at 1149. The Corporation had members from six nonpublic schools: St. Christopher, St. Catherine of Siena, St. Louis King of France, St. Agnes, St. Angela Merici, and St. Matthew the Apostle.

On February 6, 1990, JPSB paid the Corporation $100,195 "in lieu of transportation services previously provided by the [JPPSS] for some of the students attending [the six Catholic schools]." *Id.* The Corporation paid the funds to "privately contracted bus drivers" who provided bus services to 368 students attending the six schools. *Id.* at 1149-50. The district court specifically found that "the funds paid to the [Corporation] were clearly spent for transportation of nonpublic school students." *Id.* at 1150.

B.

We agree with the district court that the agreement between the JPSB and the Corporation to provide funds for the transportation of nonpublic school children does not violate the Establishment Clause. *See Helms*, 856 F.Supp. at 1150-55. The allocation of funds to the Corporation is simply one part of a broader, general program by which the State and Jefferson Parish provide a secular, noninstructional service to sectarian and nonsectarian schoolchildren alike.

The Supreme Court's decisions in *Everson* and *Wolman* furnish the guideposts for our discussion, although, as we make clear below, the Jefferson Parish program we confront here falls somewhat between the facts of those cases. In *Everson*, the Court approved a New Jersey program by which the State reimbursed parents for the cost of sending their children to and from school, whether public or parochial. *Everson*, 330 U.S. at 17, 67 S.Ct. 504. The Court analogized the reimbursement to situations "where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools," or where "state-paid policemen . . . protect children going to and from church schools." *Id.* Such services, in the Court's view, were "separate and . . . indisputably marked off from the [schools'] religious function." *Id.* at 18, 67 S.Ct. 504. *Wolman* restated the holding in *Everson* in the following way:

> The critical factors . . . are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in *Everson* passed constitutional muster because the school did not determine how often the pupil traveled between home and school – every child must make one round trip every day – and because the travel was unrelated to any aspect of the curriculum.

Wolman, 433 U.S. at 253, 97 S.Ct. 2593.

Wolman, by contrast, invalidated an Ohio statute which authorized the State to expend funds to provide "field trip transportation" to nonpublic school students on an equal basis with public school students. The Court

pointed out that in *Wolman*, unlike *Everson*, the nonpublic school controlled "the timing of the trips and, within a certain range, their frequency and destinations." *Id.* Additionally, the Court believed that "field trips," given the inevitable discussion accompanying them and the parochial schoolteacher's input and guidance, "are an integral part of the educational experience." *Id.* at 253-54, 97 S.Ct. 2593.

The Jefferson Parish program falls somewhere in the gray area between *Everson* and *Wolman*. Certainly the content of the aid provided through the JPSB-Corporation agreement is for our purposes identical to the aid provided in *Everson*: getting a child to and from school once a day. There is no evidence, as the District Court found, that the funds were used for anything other than such transportation. *See Helms*, 856 F.Supp. at 1150. The means by which the aid was administered, however, bear a vague resemblance to *Wolman*. The funds are paid, not as reimbursements to parents, but instead as a subsidy for transportation costs to a private, non-profit corporation, whose "members" were parents of children attending the six schools at issue.[20] This system is at least superficially similar to the direct payments, over which the nonpublic schools had virtually unfettered discretion, condemned in *Wolman*. *See Wolman*, 433 U.S. at 253-54, 97 S.Ct. 2593.

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[20] In rejecting the Plaintiffs' Motion for Reconsideration of Judge Heebe's ruling on the transportation issue, Judge Livaudais found that the Corporation was "non-religious and was set up exclusively to hire bus drivers to drive these children to and from school. . . . "

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Although again we must perform a balancing act between permissible and impermissible aid to sectarian institutions, we find that the arrangement at issue here bears more of a resemblance to the program upheld in *Everson* than to the one struck down in *Wolman*. The primary consideration guiding us is the character of the aid provided. Here, as in *Everson*, the payments are earmarked for a wholly secular function lacking in any educational content whatsoever – the transportation of schoolchildren to and from school. There is no danger, as there was in *Wolman*, that parochial teachers will subvert the state-funded process to further their own sectarian aims; indeed, the religious teachers have no role in this kind of transportation, and, as the District Court assured us, "[t]here has been no evidence presented that JPPSS bus drivers might impart religious beliefs to their bus passengers." *Helms*, 856 F.Supp. at 1151.

Although the means through which the aid gets to religious institutions – the Corporation – did give us pause initially, in the end we believe that the Corporation serves merely an administrative function in the aid process. The Corporation acts as a conduit through which the funds pass and is administered by the parents of schoolchildren. The Supreme Court has already approved direct reimbursements to parents in *Everson*; it would exalt form over substance to draw a constitutional distinction where the funds are paid, not to the parents themselves, but to a private corporation with the same parents as members. Furthermore, we have seen no evidence indicating that the Corporation exercises unfettered discretion over the funds. Instead, as both district judges who considered the issue concluded, the Corporation is dedicated exclusively

to facilitating secular transportation services for its members' students and has no religious objectives at all. Finally, no evidence indicates that the funds were used for anything but the permissible purpose of providing transportation services to nonpublic schoolchildren. *See Helms*, 856 F.Supp. at 1150.

We also reject Plaintiffs' argument that the transportation payments violate the neutrality requirements of the Establishment Clause because the Corporation is dedicated to serving only six nonpublic schools. This contention overlooks the fact that the Corporation focused on the six schools at issue because they had been excluded from local funding due to cuts in transportation funds from the state. Thus, the Corporation exists, not to privilege these six parochial schools, but instead to bring them to a level of services equal to other schools. Finally, the eligibility requirements for transportation aid are generally applicable to all students, both public and nonpublic. Any differences among the level of services provided from school to school (*e.g.*, frequency and pattern of busing routes, local supplement levels, etc.) arise from administrative concerns that have nothing to do with religion. Indeed, as the district court, found, although the State strives to make transportation services available equitably to both public and nonpublic students, "it appears . . . that greater benefits are provided to the public school students." *Helms*, 856 F.Supp. at 1152. We cannot understand how the Plaintiffs then complain that the transportation payment scheme operates to the unfair benefit of the six Catholic schools at issue here.

Based on *Everson* and *Wolman*, we AFFIRM the District Court's determination that the transportation payments to the Corporation, by virtue of La.Rev.Stat.Ann. § 17:158, are constitutional.

V.

In sum, then, (1) we REVERSE the district court's decision in favor of Plaintiffs and RENDER judgment in favor of Defendants declaring the Louisiana special education program, La.Rev.Stat.Ann. § 17:1941-1956, constitutional as applied in Jefferson Parish; (2) we REVERSE the district court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52 are unconstitutional as applied in Jefferson Parish; and, (3) we AFFIRM the district court's decision in favor of Defendants that the transportation payments to the Jefferson Non-Public School Transportation Corporation, by virtue of La Rev.Stat.Ann. § 17:158, are constitutional.

AFFIRMED in part; REVERSED in part and JUDGMENT RENDERED.

APPENDIX B

Mary L. HELMS, et al.

v.

Wilmer CODY, et al.
Mary L. HELMS, individually and as next friend of AMY T. HELMS, a minor;
et al., Plaintiffs,

v.

Cecil PICARD, as Louisiana State Superintendent of Instruction; et al.,

Defendants,

Guy Mitchell, et al., Intervenors.

CIV.A. No. 85-5533.

United States District Court, E.D. Louisiana.

Jan. 28, 1997.

ORDER AND REASONS

LIVAUDAIS, District Judge.

This cause came on for hearing on various days on post-judgment motions including:

1. Motion of the Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2 Program as Administered in Jefferson Parish, Louisiana (Doc. 353);

2. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order

on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367);

3. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379);

4. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380);

5. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381);

6. Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384);

7. Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S. 17:351-52 in Jefferson Parish (Doc. 392);

8. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394);

9. Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388); and

10. Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Leave of Court to Adopt Amendment to the Regulations Governing Reimbursement for Required Services (Doc. 455).

This civil action was assigned to Judge Frederick J. R. Heebe, who entered summary judgment rulings, conducted the non-jury trial, issued Findings and Conclusions and Judgment on all issues presented in the complaint, and took under submission the various post-trial motions. Upon Judge Heebe's retirement, this action

was re-allotted to this section of the Court for consideration. The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule.

REASONS

Motions relating to Chapter 2 and Louisiana School Books Programs

On March 27, 1990, the previous court granted the motion of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for summary judgment, holding that Chapter 2 of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701-3341[1], and the Louisiana equipment and materials statute, La.Rev.Stat. §§ 17:351-54, are unconstitutional. Doc. 220. The previous court applied the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1976), to determine whether government aid to private schools is constitutional. It found (1) that the primary beneficiaries of the aid are nonpublic schools; (2) that the majority of the schools receiving the aid are pervasively sectarian; and (3) that the aid has the impermissible effect of advancing religion. Doc. 220.

The parties have now requested several remedies concerning the Chapter 2 ruling:

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[1] This Act was amended, renumbered, reorganized, and expanded by Public Law 103-382, October 20, 1994. It has now been moved to 20 U.S.C. §§ 7301-7373.

1. Both federal defendants and intervenors have filed motions asking that the court reconsider its 1990 summary judgment order.

2. Both federal defendants and intervenors have filed motions to alter or amend the Judgment of July 25, 1994 with respect to Chapter 2 and the Louisiana State Books and Materials Program.

3. The federal defendants, the state defendants, and the intervenors ask for a stay pending final disposition of any appeals to the Fifth Circuit Court of Appeals. Plaintiffs oppose all of the motions for a stay of the July 25, 1994 judgment as it concerns the Chapter 2 program.

"Chapter 2" refers to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labelled "Subchapter VI – Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373. However, for ease of reference, this Court will continue to refer to the new Subchapter VI as "Chapter 2."

Chapter 2 provides financial assistance to state educational agencies ("SEAs") and local educational agencies ("LEAs") to implement eight "innovative assistance" programs. 20 U.S.C. §§ 7351(a) & (b). The innovative assistance programs are:

> (1) technology related to the implementation of school-based reform programs, including professional development to assist teachers and other school officials regarding how to use effectively such equipment and software;

(2) programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program;

(3) promising education reform projects, including effective schools and magnet schools;

(4) programs to improve the higher order thinking skills of disadvantaged elementary and secondary school students and to prevent students from dropping out of school;

(5) programs to combat illiteracy in the student and adult population, including parent illiteracy;

(6) programs to provide for the educational needs of gifted and talented children;

(7) school reform activities that are consistent with the Goals 2000: Educate America Act; and

(8) school improvement programs or activities under sections 6317 and 6318 of this title.

20 U.S.C. § 7351(b).

Plaintiffs' challenge in this case is limited to the innovative assistance program under 20 U.S.C. § 7351(b)(2) in Jefferson Parish, Louisiana.

Chapter 2 services are to be provided to children enrolled in both public and private nonprofit schools. 20

U.S.C. §§ 7312, 7372. 20 U.S.C. § 7372 provides for the participation of children enrolled in private nonprofit elementary and secondary schools. § 7372(a)(1) states:

> To the extent consistent with the number of children in the school district of a local educational agency which is eligible to receive funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located who are enrolled in private nonprofit elementary and secondary schools, or with respect to instructional or personnel training programs funded by the State educational agency from funds made available for State use, such agency, after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary for their provision . . . , or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.
>
> (Emphasis added).

Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Chapter 2 funds,

would be made available for those programs from "non-Federal sources." 20 U.S.C. § 7371(b).

Chapter 2 also requires that the control of all Chapter 2 funds "and title to materials, equipment, and property . . . shall be in a public agency . . . and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who "is independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Pursuant to Louisiana law, the Louisiana Superintendent of Public Instruction, defendant, Cecil J. Picard, is the designated SEA for Louisiana. *See* State of Louisiana Chapter 2 Guidelines, June 1989 at 1 [Fed. Ex. D-4]. The State Bureau of Consolidated Educational Programs, which was headed by Dan K. Lewis, Ph.D. at the time of trial, administers the Louisiana Chapter 2 Program. Once Louisiana receives its Chapter 2 funds from the federal government, the SEA allocates 80 percent of the funds to LEAs. *Id.* at 2-3. Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and nonprofit, private schools and 15% based on the number of children from low-income families. *Id.* at 3.

Dr. Lewis stated in his deposition that about 25% of the Chapter 2 funds are allocated to the nonpublic school sector. Lewis Dep., p. 15. For the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds. Lewis Ex. 2, pp. 99-100. Of this $655,671, $456,097 went to the public schools and $199,574 went to the nonpublic

schools. *Id.* This amounts to 70% of the Chapter 2 funds being allotted to the public schools and 30% being allotted to the nonpublic schools, including both private and religious schools.

Dr. Lewis stated that the LEAs are told that "for every dollar you spend for the public school student, you spend the same dollar for the non-public school student." Lewis Dep., p. 77. He declared that the Louisiana Department of Education "never transmit[s] dollars to the nonpublic school." *Id.* at 87.

Dr. Lewis testified that any equipment bought for the nonpublic schools with Chapter 2 funds is on loan to the nonpublic schools. *Id.* at 99. Because the nonpublic schools do not own the equipment, the ultimate authority always rests with the public school system, not the nonpublic schools. *Id.* at 99-100.

In 1984, the State instituted a monitoring process to insure that the Chapter 2 books and equipment were not being used for religious purposes. Lewis Dep., pp. 102 & 142. Dr. Lewis stated that the LEAs are encouraged to get the nonpublic schools to sign a set of assurances that they won't use the equipment for religious purposes, but the nonpublic schools are not required to sign. *Id.* at 102-03. In addition, the LEAs make monitoring visits to the nonpublic schools, and the state makes monitoring visits to the LEAs and to some of the nonpublic schools. *Id.* at 103.

The United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program on September 25-26, 1984. In their "Summary of Findings and Recommendations" as a result of their on-

site assessment, the United States Department of Education stated as follows concerning "Monitoring LEAs":

> Section 564(a)(1) of the statute provides that the State agency is responsible for the administration and supervision of programs assisted under this Chapter. Congress, in enacting the technical amendments to Chapter 2, identified technical and advisory assistance and monitoring compliance as functions of an SEA's administrative and supervisory responsibilities.
>
> We understand that there are 75 LEAs and that the SEA has developed a schedule for monitoring one third of the LEAs in each of the next three years. We suggest, if at all possible, the State increase the number of visits each year. This will lessen the possibility of audit findings of noncompliance and enable the SEA to provide technical assistance to correct problems on a timely basis.
>
> Lewis Ex. 11.

In response to the on-site assessment by the United States Department of Education, the Louisiana Department of Education made changes in monitoring the LEAs. They increased the number of on-site visits by the Chapter 2 staff to the LEAs from once every three years to once every two years. This increase in visits was to "enable more thorough, technical assistance, and the ability to correct any problems in a timely fashion." Lewis Ex. 11. In addition, in regards to private school participation in LEA Chapter 2 programs:

> [t]he State has implemented a monitoring process that includes monitoring of the private sector. The monitoring process also includes a

> review of the LEA's monitoring process of the private schools. These two processes will enhance the compliance area to ensure that all equipment is used for secular, neutral, and non-ideological purposes.
>
> Lewis Ex. 11

In Louisiana, LEAs have the primary responsibility for monitoring the Chapter 2 program for compliance with federal statutory and regulatory requirements and for compliance with state guidelines.

A report entitled "Louisiana Chapter 2 Evaluation Summative Evaluation Report 1985," (Lewis Ex. 2) was written by the Bureau of Evaluation, and was submitted to Dr. Lewis in March of 1985. This report provides under the heading "Nonpublic School Participation in Chapter 2":

> Although the LEAs handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another. Among Catholic parochial schools, however, some dioceses appoint coordinators to centralize planning and management efforts. This collective activity is more of a confederation than a school system.
>
> Funds used by nonpublic schools are almost entirely for non-recurring expenses, usually materials and equipment, and only occasionally are for such purposes as participating in LEA-sponsored staff development activities and securing consultants. Virtually all of the Chapter 2 funds used by nonpublic schools are expended under Subchapter B, the "school improvement" section of Chapter 2. Except that funds cannot

> be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed.
>
> Lewis Ex. 2, p. 28.

During the 1986-87 fiscal year, the total amount of Chapter 2 funds budgeted for nonpublic schools was $214,080.49, and the total amount budgeted for public schools was $447,067.45. Of the total of $214,080.49 in Chapter 2 funds budgeted for nonpublic schools, $94,758.15 was spent to provide library/media materials; $102,862.00 was spent for instructional equipment; and $16,460.34 was spent for local improvement programs.

Dan K. Lewis, who administers the Chapter 2 program for the state, was questioned extensively at his deposition about how the nonpublic schools' use of Chapter 2 instructional material and equipment was monitored. Lewis Dep. I. Dr. Lewis testified that he, along with Mr. Charles R. Jarreau and Mr. Ed Griffin, conducted a "monitoring visit" to Jefferson Parish on April 18, 1985. Lewis Ex. 6. An ECIA Chapter 2 Monitoring Form I was submitted to the Superintendent of the Jefferson Parish Public School System based on the visit by the monitors, Dr. Lewis, Mr. Jarreau, and Mr. Griffin. *Id.* The monitors found that "the services, materials, equipment, or other benefits provided to nonpublic schools" were not "secular, neutral and non-ideological." *Id.* They also commented that "[i]n the future, caution should be taken to ensure that books and materials purchased are secular, neutral and non-ideological." *Id.*

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, advised Dr. Carolyn C. Weddle, Assistant Superintendent for Instructional Programs, about the monitoring visit conducted by the Louisiana Department of Education. She explained an incident which resulted in the negative finding by Dr. Lewis and his team concerning "secular, neutral, and non-ideological" assistance provided to the nonpublic schools as follows:

> St. Rosalie's library print-out showed [that] a copy of [the book] Biography of the Saints was purchased with Chapter II funds. However, St. Rosalie contacted my office Friday to correct that entry on their library print-out. No Chapter II funds were used to purchase above, and my official response to Dr. Lewis will state same.

Lewis Ex. 11.

According to Ruth Woodward, library books are only ordered for nonpublic schools, not public schools. Woodward Dep., p. 73. The library books are stamped with "ECIA, Chapter 2." *Id.* at 75. After reviewing the book orders from 1982, Ms. Woodward discovered approximately 191 books were in violation of the Chapter 2 guidelines. *Id.* at 74. Those books were recalled and were donated to the Jefferson Parish Public Library. *Id.* at 75.

Ms. Woodward reviews each of the titles of the books and other materials that are received by her office from the nonpublic schools. *Id.* at 88. If she finds a title to be inappropriate, she deletes the title from the list and selects a title from the substitute list. *Id.* at 90.

In addition to library books, computers, slide and movie projectors, and overhead projectors are purchased through the program. *Id.* at 92. During her monitoring visits to the schools, she has "normally" found that the materials and equipment are used in accordance with Chapter 2 guidelines. *Id.* at 101. Ms. Woodward stated in her deposition that she normally has "a single visit" to a nonpublic school during the school year. *Id.* at 118.

Ms. Woodward stated that none of the Chapter 2 money is given directly to either the public or nonpublic schools in the form of cash or a check. *Id.* at 207. The funds are retained and administered by her office. *Id.*

On March 27, 1990, the prior court granted partial summary judgment and struck down portions of the federal Chapter 2 program and the Louisiana state books and materials program authorized pursuant to La.Rev.Stat. §§ 17:351-52, as administered in Jefferson Parish, Louisiana. (Doc. 220). The use of federal funds to provide instructional equipment (including computer and audio-visual equipment), educational materials, library books, and supplies to pervasively sectarian schools under Chapter 2 was held unconstitutional and lending of such items enjoined. *Id.*

Attention was specifically focused on 20 U.S.C. § 7372(a)(1)[2] which permits the furnishing of Chapter 2 materials and equipment to nonpublic schools. The "services, materials, and equipment" provided under Chapter

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[2] At the time of the Court's 1990 ruling, this section was codified at 20 U.S.C. § 2972(a)(1). For ease of reference, the Court will now cite to the new United States Code sections.

2 for the benefit of the nonpublic schools must be "secular, neutral, and nonideological." 20 U.S.C. § 7372(a)(1). It was noted that "[t]he nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites."

The Jefferson Parish Chapter 2 program was held unconstitutional on three grounds:

> First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion.
>
> Order and Reasons, (Doc. 220, p. 15).

Federal defendants and intervenors argue that the holding should be reconsidered for two main reasons. First, they claim that a major premise of the decision, i.e., that "the primary beneficiaries" of Chapter 2 "are nonpublic schools," is simply incorrect. Benefits are provided under this program for use by all schoolchildren in Jefferson Parish, both public and nonpublic, and the majority of the beneficiaries are public school children.

Second, federal defendants state that the other primary basis of the 1990 Chapter 2 Order – that the Jefferson Parish Chapter 2 program is automatically unconstitutional when Chapter 2 benefits are used at

schools deemed to be "pervasively sectarian" – has been specifically and repeatedly rejected by the Supreme Court.

Federal defendants argue that the Supreme Court has never held that an educational aid program impermissibly advanced religion when the program was a neutral, general program designed to apply equally to both public and nonpublic school children, with the primary beneficiaries being public school children, as is Chapter 2. Federal defendants contend that the Supreme Court has only found improper "advancement" of religion in some of the cases when the program singled out school children in nonpublic or pervasively sectarian schools as its "primary beneficiaries." Federal defendants maintain that the Chapter 2 program does not so single out nonpublic school children and is constitutionally valid.

Federal defendants argue that this decision was the first to invalidate any aspect or application of the nationwide Chapter 2 program, which has been in place, in its present form or in various predecessor statutes, for nearly 30 years. In an opinion issued after the 1990 Chapter 2 Order, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2, and upheld the Chapter 2 program. *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (9th Cir. 1995), reh'g and reh'g en banc denied, 62 F.3d 300 (9th Cir. 1995). No petition for certiorari was filed in *Walker*.

The *Walker* court noted that "approximately seventy-four percent of the Chapter 2 benefits went to public schools and twenty-six percent went to private schools." 46 F.3d at 1464.

Federal defendants and intervenors claim that the *Walker* court's analysis is consistent with the prior court's analysis in its post-trial opinion, in which it found that public school students are the primary beneficiaries of funding under Chapter 1. Federal defendants and intervenors argue that the post-trial analysis on this issue is correct and should be applied to Chapter 2.

Federal defendants and intervenors claim that in its post-trial opinion, the previous court rejected Establishment Clause challenges to Chapter 1 and the school bus transportation program, on the grounds that the primary beneficiaries of those programs are not nonpublic schools. Rather the "primary beneficiaries" are either students at public schools, who constitute the majority of students receiving Chapter 1 benefits, or all school children or their parents who receive the benefits of the school bus transportation program. Federal defendants and intervenors argue that the federal Chapter 2 program, as well as the state school books and materials program, are also neutral, general benefit programs, and so the earlier ruling on Chapter 2 should be vacated.

Plaintiffs oppose the motions of federal defendants and intervenors and cite to the relevant Supreme Court cases.

In *Meek v. Pittenger*, 421 U.S. 349, 364 (1975), the Supreme Court invalidated a materials and equipment program which was specifically and intentionally directed only to nonpublic schools, the majority of which were found to be religious.

In *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977), the Supreme Court invalidated a program authorizing the

loan of instructional equipment and materials to the parents of nonpublic school students only.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Supreme Court upheld a Minnesota statute that allowed a tax deduction for all state taxpayers, including parents of children attending religiously-affiliated private schools, for education-related expenses such as tuition, textbooks, and transportation.

However, in *Mueller*, the Court found significant the fact that the "public funds . . . become available only as a result of numerous private choices of individual parents of school-aged children." *Id.* at 399.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court held that provision of aid under a state vocational rehabilitation program to a student attending a private Christian college for the purpose of pursuing a religiously-based career would not, in violation of the Establishment Clause, have the primary effect of advancing religion.

Plaintiffs point out that in *Witters* it was the individual blind student who made the decision completely independent from any sectarian institution with regard to where his grant money would be spent. The sectarian institution, therefore, had no part in the planning of the program or the decision concerning who would receive the benefit. The Court in *Witters* noted that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the state," citing *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985).

The primary argument of the federal defendants is that aid to nonpublic schools in the form of loans of educational equipment, such as computers, overhead projectors, videos, duplicating machines, and the like, is constitutional as long as the authorizing legislation provides for such loans and grants to both public and nonpublic schools. According to defendants, the constitutionality of such a program is dependent on a single factor – the breadth of the class of recipients.

Plaintiffs rely on *Bowen v. Kendrick*, 487 U.S. 589 (1988), in which the Court observed that "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Id.* at 609. The Court stated that "[o]ne way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.' " *Id.* at 610. The Court, however, concluded that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* The Court did not suggest all or most, but only a "significant proportion" need flow to pervasively sectarian institutions for the program to be constitutionally flawed.

Plaintiffs contend that Chapter 2 is unconstitutional as applied in Jefferson Parish for two main reasons: 1) Much of the Chapter 2 equipment and materials provided to sectarian schools in Louisiana is easily divertible to religious activities; and 2) Like the Ohio statute in *Wolman*, it provides equipment directly for the sectarian schools, not the individuals.

Plaintiffs contend that *Wolman* "trashed" the argument that *Meek* and *Wolman* stand for the proposition that gifts magically take on a constitutional character if a single neutral statutory provision includes both public and nonpublic elementary and secondary schools as recipients.

Both defendants and plaintiffs rely on *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462 (1993). In *Zobrest*, the Supreme Court held that the Establishment Clause did not prohibit a public school district from providing a sign language interpreter at state expense in a Catholic school. The Court noted that "[d]isabled children, not sectarian schools, are the primary beneficiaries" of the program. *Id.* at 12, 113 S.Ct. at 2469.

The *Zobrest* Court noted that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8, 113 S.Ct. at 2466.

The *Zobrest* court made a sharp distinction between direct and indirect aid to pervasively sectarian institutions. The Court found that the aid provided to James Zobrest was indirect, as distinguished from the direct subsidy through the providing of teaching material and equipment in *Meek* and the providing of teachers and instructional equipment and materials in *Ball*. *Id.* at 12, 113 S.Ct. at 2468-69.

The *Zobrest* Court quoted from *Witters* and *Ball*: "[T]he State may not grant aid to a religious school,

whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 12, 113 S.Ct. at 2468.

Plaintiffs argue that to determine whether the program of furnishing instructional equipment, materials, and supplies to parochial schools in Jefferson Parish more closely resembles the programs struck down in *Meek* and *Ball* or the programs upheld in *Mueller* and *Witters*, this Court needs to determine the substantive impact of the aid, that is, whether the aid is truly to the individual student or rather directly to the school. If the aid is truly to the individual student, plaintiffs argue that the aid should be upheld. However, if the aid is directly to the nonpublic school, then the aid should be ruled unconstitutional.

Federal defendants contend that the rulings on the Chapter 2 summary judgment motion and the Chapter 1 post-trial findings and conclusions have not been consistent. Federal defendants state that there is no difference between the Chapter 1 and the Chapter 2 programs as to who are the primary beneficiaries. Thus, federal defendants argue that since Chapter 1 was found constitutional on its face, then Chapter 2 should also be upheld.

Plaintiffs disagree and argue that the rulings have been consistent. The Chapter 2 program struck down by the previous court concerned "nonpublic schools receiv[ing] an allotment [of funds] which allows them to order instructional materials and equipment, including library books." (Doc. 220, p. 4). Thus plaintiffs contend that it was found that the aid flowed directly to the nonpublic schools.

The ruling as to the Chapter 1 capital expense statute related to "funds to pay the costs of maintaining Chapter 1 services off of the premises of parochial schools at 'neutral sites.' " (Doc. 337, p. 142). The decision provides that "[u]nder § 2727(d)(A), the Secretary distributes the appropriate [Chapter 1 capital expense] funds to each state according to a statutory formula. Local Educational Agencies (LEAs) apply to the State Educational Agencies (SEAs) to receive the funds, and the SEAs distribute the funds to LEAs on the basis of need, according to criteria the SEAs have established." *Id.* at 144.

Plaintiffs contend that there is no conflict between the summary judgment ruling on Chapter 2 and the post-trial findings and conclusions regarding the Chapter 1 capital expense provision. Plaintiffs argue that the decision concluded that Chapter 2 directly benefitted pervasively sectarian schools, while under the Chapter 1 capital expense statute, no tax-derived funds ever reached nonpublic schools. Chapter 1 only benefitted students who received remedial services rendered by public employees outside of parochial school facilities.

In fact, plaintiffs maintain that the findings and conclusions suggested that the Chapter 1 capital expense statute had only the indirect effect of aiding sectarian schools and concluded "that [this] indirect effect does not render the government aid [provided by Chapter 1] unconstitutional." (Doc. 337, p. 154).

Plaintiffs argue that *Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449 (9th Cir. 1995), which ruled that Chapter 2 is constitutional, is distinguishable from the

instant case. Plaintiffs state that there are significant differences in the Chapter 2 program as administered in Jefferson Parish and the Chapter 2 program administered in the San Francisco Unified School District.

Plaintiffs contend that the items provided in Louisiana under the Chapter 2 program are easily diverted to religious purposes. The items provided in Louisiana include maps, globes, laboratory equipment, tape recorders, projectors, and other audio-visual equipment. In San Francisco, the Chapter 2 materials were confined to prescreened textbooks, instructional materials, and "locked" computer hardware and software that could not be diverted to religious use.

Plaintiffs submit that because the instructional equipment and materials are so easily divertible, there is basically no constitutionally permissible monitoring scheme available to prevent constitutional violations. Plaintiffs argue that the evidence in this case demonstrates that audio-visual equipment, such as overhead projectors, VCRs, etc., which are usable equally in religion and science classes and are thus easily divertible, cannot be effectively monitored. In the case of *Jefferson Parish*, unlike *Walker*, plaintiffs claim that the evidence shows that such equipment has actually been used in classes teaching religion. Thus, plaintiffs state that the effectiveness of any so-called monitoring conducted by the officials charged with such responsibilities has proven to be ineffective.

The prior court observed in its March 27, 1990 Order that the program found unconstitutional in *Meek* involved just under $12 million of direct aid to predominantly

church-related nonpublic schools in Pennsylvania through the loan of instructional materials and equipment. It concluded that this amounted to approximately $9,090 per school and that the Meek court firmly determined that this aid was "neither indirect nor incidental." (Doc. 220, p. 13). The evidence in this case indicates that for fiscal year 1985, a total of $207,648 was allocated under Chapter 2 for the 41 participating nonpublic schools in Jefferson Parish. This comes to $5,064 for each participating school. In addition, another $649,344 was allocated to the 56 participating nonpublic schools in Jefferson Parish under the state program providing free books, materials, and supplies. This comes to another $11,595 per participating school. Plaintiffs maintain that the Chapter 2 program administered in Jefferson Parish involves a significant number of pervasively sectarian schools and provides substantial direct aid to pervasively sectarian elementary and secondary schools and thus is violative of the Establishment Clause.

In its 1990 Chapter 2 Order, the prior court focused on the Chapter 2 program and did not undertake a detailed analysis of the Louisiana statutes, La.Rev. Stat.Ann. §§ 17:351-352, which authorize the provision of school books and instructional materials to students at public and nonpublic schools, or the implementation of that program in Jefferson Parish. Plaintiffs have not challenged the provision of textbooks pursuant to the statute. An overwhelming portion of the funds are used to purchase textbooks.

Intervenors note that library reference books purchased pursuant to La.Rev.Stat.Ann. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary

and Secondary Education. Fine deposition at 186 and Ex. 57. Books and instructional materials may only be ordered from state-approved lists and sources. Fine deposition at 129 and Ex. 25. Intervenors argue that these safeguards are more than adequate to assure that the funds are not used for religious purposes.

In June of 1995, the United States Supreme Court most recently examined the Establishment Clause in *Rosenberger v. Rector & Visitors of Univ. of Va.*, ___ U.S. ___, 115 S.Ct. 2510 (1995). In *Rosenberger,* the University of Virginia withheld authorization for payments from its Student Activities Fund to cover the printing costs of a religious newspaper issued by a student group. The University found that the student newspaper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," as prohibited by the University's guidelines. *Id.* at 2513. The Supreme Court found no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause. *Id.* at 2525.

The *Rosenberger* court stated "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 2521. The Supreme Court found that the Student Activities Fund (SAF) was neutral toward religion and that there was no suggestion that the SAF had been created to advance religion or to aid a religious cause. *Id.* at 2522.

The *Rosenberger* Court reaffirmed the principle that there are "special Establishment Clause dangers where

the government makes direct money payments to sectarian institutions. . . . " *Id.* at 2523. The Supreme Court was careful to point out the following:

> We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.
>
> *Id.*

Before *Rosenberger* was decided, in January 1995, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2 in *Walker*. The Ninth Circuit Court of Appeals held "that under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." 46 F.3d at 1465. In *Walker*, the San Francisco Unified School District (the District) received the Chapter 2 funds from the State and then the District directly purchased the materials for the private schools. *Id.* at 1464. Title to all of the materials and equipment purchased remained with the District. *Id.* There were no funds directly provided to the private schools. *Id.* The materials and equipment purchased for the private schools included "library books, textbooks, videos, overhead projectors, movie and slide projectors and projection stands, television sets, record players, cassette recorders, VCR's, video cameras, 'listening centers,' globes and maps, microscopes and other lab equipment,

computer equipment, musical equipment, stereo systems, and desks and tables." *Id.*

The *Walker* court applied the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1976). The three part *Lemon* test requires that for a state aid program to be constitutional, 1) it must have a secular legislative purpose; 2) it must not have as its principal or primary effect the advancement or inhibition of religion; and 3) it must not foster excessive government entanglement with religion. 46 F.3d at 1455. In *Walker*, the Ninth Circuit found that Chapter 2 funding passes all three prongs of the *Lemon* test. 46 F.3d at 1469.

The *Walker* court found that "[t]he purpose of Chapter 2 is to improve resources available to schools to increase the quality of education." *Id.* at 1464. This was found to be a valid secular purpose.

As to the second prong, the Ninth Circuit held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." *Id.* at 1465. The *Walker* court chose not to rely on *Meek* and *Wolman* which had struck down programs which loaned neutral and secular instructional materials and equipment to parochial schools. Rather the court in *Walker* relied on recent Supreme Court cases which have focused on government neutrality toward religion. *Id.* at 1466.

The *Walker* court stated:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious

> institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state. We therefore must analyze (1) whether the Chapter 2 benefit at issue is a general welfare benefit neutrally available to a broad class of people without reference to religion, *Zobrest*, ___ U.S. at ___, 113 S.Ct. at 2466, and (2) whether the benefit, even though generally available, creates a symbolic union of church and state. *Ball*, 473 U.S. at 389, 105 S.Ct. at 3226.
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> 46 F.3d at 1467.

Applying the first part of the test, the *Walker* court found that Chapter 2 benefits are neutrally available without reference to religion. *Id.* The court found that 74% of the benefits went to public schools with the remaining 26% divided between nonreligious and religious private schools. *Id.* Thus the court held that "the overwhelming percentage of beneficiaries are nonparochial schools and their students." *Id.*

In addition, the court found that controls were in place to prevent Chapter 2 benefits from being "diverted" to religious instruction, such as, (a) prescreening the textbooks and other materials; (b) title to the books and materials remains in the public agency; (c) parochial schools pledge not to use the Chapter 2 materials for religious purposes; (d) the School District made yearly monitoring visits; and (e) all Chapter 2 services must be provided by persons independent of the private school and of any religious organizations. *Id.*

As to the second part of the test, the *Walker* court found that the loaning of instructional materials and

equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. Applying *Zobrest*, the court found that if having a public employee present in a parochial school classroom does not create a symbolic union between church and state, then providing religiously neutral instructional materials and equipment to parochial schools does not create a symbolic union either. 46 F.3d at 1468.

The *Walker* court distinguished the statutes struck down in *Meek* and *Wolman* from Chapter 2, finding that the statutes in *Meek* and *Wolman* were not neutral. In *Meek* and *Wolman*, most of the aid was targeted at private schools, the majority of which were church-related. 46 F.3d at 1468. In *Walker*, 74% of the Chapter 2 benefits went to public schools, and of the remaining 26%, less than 70% of the 26% went to religious private schools. *Id.* Thus the court found that "Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." *Id.* Thus Chapter 2 was found not to have as its principal or primary effect the advancement or inhibition of religion. *Id.* at 1469.

Finally, the *Walker* court analyzed whether all of the controls in place to prevent Chapter 2 benefits from being diverted to religious instruction resulted in excessive entanglement between church and state. 46 F.3d at 1469. The court noted that the Supreme Court in *Zobrest* did not even mention the third prong of *Lemon* when it allowed an interpreter to be present in a pervasively sectarian parochial school classroom. *Id.* Since the *Zobrest* Court did not find excessive governmental entanglement, the *Walker* court followed the lead in *Zobrest* and found that

the Chapter 2 controls did not result in excessive entanglement between church and state. *Id.*

Based on *Rosenberger* and *Walker*, this Court finds that the Chapter 2 funding passes all three prongs of the *Lemon* test. It is clear that the neither the state nor the federal government makes any direct money payments to the nonpublic schools, which was the "special Establishment Clause danger [ ]" set forth in *Rosenberger*. 115 S.Ct. at 2523. No public funds were received by the nonpublic schools in Jefferson Parish.

Applying the first prong of the *Lemon* test, as the court found in *Walker*, Chapter 2 passes the first part of the *Lemon* test. Increasing the quality of education is clearly a valid secular purpose. 46 F.3d at 1464.

As to the second prong, this Court will follow the finding of the Ninth Circuit that the loaning of neutral, secular equipment and instructional materials to parochial schools pursuant to Chapter 2 does not have the primary or principal effect of advancing religion. *Id.* at 1465. The facts in the instant case are virtually indistinguishable from those present in *Walker*.

This Court finds that Chapter 2 benefits are neutrally available without reference to religion. Between 70 and 75% of Chapter 2 benefits are allocated to public schools each year, and between 25 and 30% are allocated to the nonpublic schools, including both private and religious schools. Thus as in *Walker*, it is clear that the overwhelming percentage of Chapter 2 benefits is provided to the public schools.

In addition, all of the monitoring controls in effect in *Walker* are present in this case. The library books and other instructional equipment are prescreened and title remains with the public agency. Most parochial schools sign a pledge agreeing not to use the Chapter 2 materials for religious purposes and the Chapter 2 coordinator makes yearly monitoring visits to the nonpublic schools. In addition, the State makes monitoring visits every two years to the nonpublic schools. Finally, employees of a public agency provide the Chapter 2 services and no money is directly paid to the parochial schools. The Court follows *Walker* and finds that these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.

This Court will also follow the holding of *Walker* that the loaning of instructional materials and equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. For all of these reasons, this Court finds that Chapter 2 does not have as its principal or primary effect the advancement or inhibition of religion.

Finally this Court finds that the controls in place to prevent Chapter 2 benefits from being diverted to religious use did not result in excessive entanglement between church and state, relying on *Walker* and *Zobrest*. Thus Chapter 2 complies with the third prong of *Lemon*.

Based on the Ninth Circuit's 1995 decision in *Walker* and recent United States Supreme Court decisions, in particular, *Zobrest* and *Rosenberger*, this Court will now set aside the prior court's March 27, 1990 ruling. This Court finds that Chapter 2, now known as Subchapter VI

of the Improving America's Schools Act of 1994, 20 U.S.C. §§ 7301-7373, and the Louisiana Equipment and Materials Statute, La.Rev.Stat. §§ 17:351-54, do not violate the Establishment Clause, facially and/or as applied in Jefferson Parish, Louisiana. This Court will vacate the Order and Reasons of March 27, 1990, and deny plaintiffs' motion for partial summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute and will grant the motions of the federal defendants, the state defendants, and the intervenors for summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute.

Motion of plaintiffs to alter or amend the judgment on the school bus transportation program

La. Rev. Stat. 17:158 requires that each parish or school board provide free transportation for any student attending a school within its jurisdictional boundaries if the student resides more than one mile from the school, and allows that parish or school board to contract out the transportation services. The statute applies to all eligible public and non-public school students.

The JPPS provided transportation to over 41,000 students by school bus in 1988-1989 (coinciding with the trial), of which 85.6% were public school students, 12.4% were Catholic in-district school students, and 1.4% were Catholic out-of-district students, and .5% were Lutheran school students. Catholic out-of-district students are Catholic school students who attend Catholic school at schools which are not within their church parishes, sometimes because their church parishes do not have schools.

The Supreme Court has held that the Establishment Clause of the First Amendment does not prohibit the state from paying for the transportation of schools children to parochial as well as public schools, so long has the school has no control over the expenditure of the fund and the effect of the expenditure is unrelated to the content of the education provided. *Wolman v. Walter*, 433 U.S. 229, 253, 97 S.Ct. 2593, 2608 (1977). The provision of such transportation to the parochial school student is constitutional if the school does not determine how often the child is transported, i.e., the child must make one-round trip to and from school every day and the travel is unrelated to any aspect of the curriculum. *Wolman*, 433 U.S. at 253, 97 S.Ct. at 2608.

At issue in this particular motion is the decision of Judge Heebe that it is constitutional for the JPPS and the State of Louisiana to provide funds to the Jefferson Parish Nonpublic School Transportation Corporation for the purpose of contracting bus services to students who attend non-public schools in JP, but that it is unconstitutional to send the money directly to the schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, because there is no limitation on the way those schools could use the money.

The Jefferson Parish Nonpublic School Transportation Corporation ("the corporation") is a corporation established by parents of children who attend nonpublic schools. The purpose of the corporation was to provide transportation to these children to and from school. The reason the corporation was established was that there was a significant funding cut to the JPPS for transportation in the 1988-1989 school year, and thus no funds were

allocated for transportation services to children attending non-public schools outside of their district. The JPPS hired bus drivers and set up bus routes for both public school children and non-public school children attending school in their districts.

After the routes were set, more funds were allocated to provide transportation to non-public school children attending school outside of their districts. In order to obtain the transportation, the corporation, which is non-religious and was set up exclusively to hire bus drivers to drive these children to and from school, was created and contracted with the JPPS to provide purely secular transportation services. JPPS also contracted directly with two religious schools to provide their own transportation services and paid them directly.

Judge Heebe found that providing funding to the private corporation to supply purely secular transportation services to nonpublic school students was not unconstitutional in design, or in practice, except that sending the funding directly to two pervasively sectarian schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, was unconstitutional as it was direct money to the schools which they could divert to religious purposes.

The plaintiffs disagree with this holding, but the decisions of *Rosenberger*, 115 S.Ct. 2510 (1995), and *Walker*, 46 F.3d 1449 (9th Cir. 1995) both support it. As previously noted in the Chapter 2 discussion, *Rosenberger* holds that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," but that when the services or funds

supplied are neutral, routine, and secular, then any benefit to religion is incidental to the government's provision of the services and does not offend the Constitution. 115 S.Ct. at 2523-2524. Judge Heebe found that the funds were used by the corporation solely for transportation services, which is a secular, neutral, and routine service, and that a variety of schools with children of all different religions use the transportation services.

Upon review of the entire matter, Judge Heebe's decision should be upheld and thus, the plaintiffs' motion to alter or amend the judgment on the school bus transportation program should be denied.[3]

Motion of state defendants for leave of court to adopt amendment to the regulations governing reimbursement for required services

In the judgment entered on July 25, 1994, Judge Heebe enjoined further administration of the Reimbursement of Required Costs Program "until such time as it has been satisfactorily demonstrated to this Court that the Louisiana Superintendent of Education and the Board of Elementary and Secondary Education (BESE) will properly administer the reimbursement program as prescribed by La. Rev. Stat. 17:361-365." In 1996, BESE adopted a motion to amend the regulations governing the program to allow for alternative documentation for missing time sheets for the school years 1993-94, 1994-95, and

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[3] This Court is somewhat troubled by the apparent lack of monitoring of the corporation's use of the funds, but considering the limited nature of the corporation's functions, does not find the program unconstitutional.

1995-96 only. In exchange for allowing alternative documentation, which BESE determined to be necessary due to the past laxity in the administration of the program, only 70% of the claimed amount would be considered for payment.

The plaintiffs oppose the motion because the statute requires that actual time records be kept and that estimates or "parameters" were not sufficient documentation for payment. They further note that unless "actual cost" to the school is used as a basis for determining what funds are due, there is the possibility that the nonpublic schools can greatly inflate the claim. By way of example, one school which requested 705 hours for performing a particular service for the 1984-1985 school year sought reimbursement for 3,860 hours for performing the same service for the 1992-1993 school year.

Apparently, there are only 5 schools which will be affected by the change in the regulations and only three school years are included. The nature of the relief requested is minimal and the schools' requests will, at a minimum, be subject to a 30% reduction. At the present time, payment of funds under the Required Services Reimbursement program is enjoined due the inadequacy of the auditing procedure. Considering the totality of the circumstances, the Court finds that the request is reasonable and does not infringe on the plaintiff's constitutional rights and thus will provide this limited relief to the state defendants.

Accordingly,

IT IS ORDERED that the Motion of the Federal Defendants, Richard W. Riley as Secretary of the United

States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2 Program as Administered in Jefferson Parish, Louisiana, be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Order and Reasons entered on March 27, 1990 (Doc. 220), be, and the same is hereby VACATED, except to the extent that such Order and Reasons found that those nonpublic schools in Jefferson Parish, Louisiana, which are operated under the auspices of the Archdiocese of New Orleans, are "pervasively sectarian." (Doc. 220, p. 11)

IT IS FURTHER ORDERED that the Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for Partial Summary Judgment on the Chapter 2 Program and the Louisiana State School Books and Materials Program (Doc. 165), be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Cross-Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Summary Judgment

on Plaintiffs' Chapter 2 claims (Doc. 178), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Cross-Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Summary Judgment on Chapter 2 (Doc. 180), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for partial summary judgment on Chapter 2 and the Louisiana State School Books and Materials Program (Doc. 166), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S 17:351-52 in Jefferson Parish (Doc. 392), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Plaintiffs Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388) be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education (Doc. 455) for Leave of Court to Adopt Amendments to the Regulations Governing Reimbursement for Required Services be, and the same is hereby GRANTED.

AMENDED JUDGMENT

Considering the record, this Court's ruling on the motions of intervenors and the state defendants to lift the injunction, the Order and Reasons entered this date on all outstanding motions, and the law, the Final Judgment entered by Judge Frederick J.R. Heebe on July 25, 1994 (Doc. No. 374) is hereby AMENDED in the following respects:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton

Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; DECLARING that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana state legislature, is constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction previously entered against defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of

Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board enjoining them from furnishing instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana legislature, be and is hereby LIFTED AND VACATED.

In all other respects, the Judgment remains as entered.

APPENDIX C

Mary L. HELMS, individually and as next friend of Amy T. Helms, a minor; et al., Plaintiffs,

v.

Wilmer CODY, as Louisiana State Superintendent of Instruction; et al., Defendant,

Guy Mitchell, et al., Intervenors.

CIV.A. No. 85-5533.

United States District Court, E.D. Louisiana.

March 27, 1990.

MINUTE ENTRY

HEEBE, Chief Judge.

ORDER AND REASONS

This matter was submitted on the briefs to the Court without oral argument. Currently before the Court are the Motions of the Federal Defendants, the State Defendants, the Intervenors, and the Plaintiffs for Summary Judgment regarding the Constitutionality of the Chapter 2 education statute, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54.

The Court, having fully considered the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54, be, and the same is hereby GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54 be, and the same are hereby DENIED.

REASONS

The primary issue for consideration is whether 20 U.S.C. Sections 2701-3341 and La.Rev.Stat. Sections 17:351-52 violate the Establishment Clause, facially and/or as applied in Jefferson Parish in Louisiana. The statutes provide for school books, materials, and services which the plaintiffs contend directly aid the nonpublic, religiously affiliated elementary and secondary schools, in violation of the Establishment Clause. Plaintiffs move for summary judgment asking the Court to declare the two statutes unconstitutional. Plaintiffs do not challenge in their current Motion for Summary Judgment the benefits being provided pursuant to these statutes to nonsectarian, non-religiously affiliated, non-discriminatory private schools.

Defendants and Intervenors contend that the statutes are constitutional because 1) the statutes have a secular purpose; 2) the nonpublic schools are not the primary beneficiaries of the aid; 3) the schools receiving the aid are not pervasively sectarian; and 4) the aid neither advances religion nor causes excessive entanglement. The Defendants and Intervenors move for summary judgment, asking the Court to declare the two statutes constitutional.

The statutes, in pertinent part, read as follows:

Section 351:

> A. The State Board of Elementary and Secondary Education shall prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of this state at the elementary and secondary levels out of funds appropriated therefor by the legislature in accordance with the requirements of Article VIII, Section 13(A) of the Constitution.
>
> B. The board also shall prescribe and supply schoolbooks and other materials of instruction for use by students attending vocational-technical schools and programs under the jurisdiction of the board.

Section 352:

A. The State Board of Elementary and Secondary Education, the State Department of Education, or either of these shall take such action as is necessary to assure that all school books, films and booklets related thereto, other similar audio-visual devices, and any other similar materials of instruction are thoroughly screened, reviewed and approved as to their content by the State Board of Elementary and Secondary Education and the local parish or city school board concerned.

C. The State Board of Elementary and Secondary Education shall adopt rules and regulations to carry out the provisions of this Section.

La.Rev.Stat. Sections 17:351-52.

Twenty U.S.C. Section 2972(a)(1) provides, *inter alia*, that:

> a local educational agency [LEA] . . . shall provide for the benefit of such children in such school's secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary . . .

The nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites. (*See* Lewis Exs. 4 and 5).

Nonpublic schools in Jefferson Parish have participated in the past exclusively under the subchapter B provision of the program, 20 U.S.C. Section 2941(b). (Woodward at 28-29). Under this subchapter, nonpublic schools receive an allotment which allows them to order instructional materials and equipment, including library books. No textbooks are ordered under Chapter 2 in Jefferson Parish. (Woodward at 128). Besides library books, the equipment ordered by schools includes computers and computer peripherals, computer software, projectors, screens, maps, and globes. (Kropog Exs. 2, 8, 9, and 10; Woodward Ex. 1; Plaintiffs' Motion Exs. 1-6). In

Louisiana, the funds allocated to nonpublic schools under Chapter 2 for 1985 totalled $5,064 per school.

ISSUE: WHETHER CHAPTER TWO'S MATERIAL, EQUIPMENT, AND SUPPLIES PROVISIONS AND LA.REV.STAT. SECTIONS 17:351-54 VIOLATE THE ESTABLISHMENT CLAUSE ACCORDING TO THE THREE-PART *LEMON* TEST.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1976), the Court set forth a three part test for determining whether government aid to private schools is constitutional. The three part *Lemon* test requires that for a state aid program to be constitutional, 1) it must have a secular legislative purpose, 2) it must not have as its primary effect the advancement nor inhibition of religion, and 3) it must not foster excessive entanglement. 403 U.S. 602, 612-13. In the present case, there is a legitimate secular legislative purpose to the statutes: to improve elementary and secondary education for children attending both public and private schools. 20 U.S.C. Section 3811(a). Therefore, the aid meets the first part of the *Lemon* test.

The second prong of the *Lemon* test provides that the government aid to private education must neither advance nor inhibit religion. The Court has held that the pervasive sectarianism of an institution raises a presumption that any direct aid to that school either advances or inhibits religion. *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562, 2576 (1988) (Citations omitted). Therefore, an analysis of whether the institutions in this case are pervasively sectarian will be undertaken.

ISSUE: WHETHER THE PRIMARY BENEFICIARIES OF THE AID ARE PERVASIVELY SECTARIAN.

Several Supreme Court cases provide guidance in making a determination regarding whether the primary beneficiaries of the aid are pervasively sectarian. In *School District of Grand Rapids v. Ball*, 473 U.S. 373, 384 (1985), 40 out of 41 schools participating in the challenged programs were identifiably sectarian. In *Aguilar v. Felton*, 473 U.S. 402, 406 (1985), 84% of Chapter 1 students in nonpublic schools were in Catholic schools, and 8% in Hebrew schools. In *Wolman v. Walter*, 433 U.S. 229, 234 (1977), only 29 out of 720 nonpublic schools were not sectarian, and only 4% of the nonpublic school students attended nonsectarian schools. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. *Id.* In *Meek v. Pittenger*, 421 U.S. 349, 364 (1975), the Court found the primary beneficiaries of the aid in question to be sectarian schools because they accounted for more than 75% of nonpublic schools.

In *Felton*, 473 U.S. at 412, the Court addressed an argument that the program at issue should be upheld because many of the schools did not have the degree of sectarianism that would trigger Establishment Clause problems. The Court answered by quoting with approval the Second Circuit opinion in Felton:

> "Yet . . . enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies . . . . "

473 U.S. at 412, n. 8.

The *Wolman* Court relied heavily on the *Meek* Court's statement that:

> The very purpose of many of those schools is to provide an integrated secular education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *See Lemon v. Kurtzman*, 403 U.S., at 616-17. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'

Wolman, 433 U.S. at 250 (citations omitted). Further, the Wolman Court stated that: "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." *Id.* The factors, *inter alia*, upon which the Court determined that the schools in *Wolman* were pervasively sectarian are as follows:

> 1. the schools operated under the general supervision of the bishop of their diocese;
>
> 2. most principals were members of a religious order within the Catholic Church;
>
> 3. a little less than one-third of the teachers were members of the Catholic faith;
>
> 4. many of the rooms and hallways in these schools were decorated with a Christian symbol;

5. the state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction;

Id. at 234.

A list of the nonpublic schools participating in the Jefferson Parish Chapter 2 program for 1986-87 (which is not materially different from the current participants) shows 46 participants. Of these, 41 are religiously-affiliated with 34 being Catholic schools. (*Woodward* Ex. 2; *Fine* Ex. 3). These religiously-affiliated schools receive 96% of the Chapter 2 funds allocated for nonpublic schools in Jefferson Parish. (*Cannon* Ex. 18). Additionally, 76% of the nonpublic schools participating in the state program under La.Rev.Stat.Ann. Sections 17:351-52 in Jefferson Parish are religiously-affiliated, and these schools receive 89% of the funds allocated under that program for nonpublic schools. (*Cannon* Ex. 18).

The Catholic schools, which represent the majority of nonpublic schools participating in the programs, operate under the general supervision and authority of the Archbishop of New Orleans and the parish pastor. (*Kropog* Vol. I at 202; *Cannon* Vol. I at 19; *Kropog* Vol. I at 203; *Junkin* at 10-11). The schools are located next to the parish church and sometimes the rectory or convent. (*Cannon* Vol. I at 23-24; *Kropog* Vol. I at 35-36; *Junkin* at 16). The schools contain religious symbols in the classrooms. (*Junkin* at 66).

At least some of the schools exercise a religious preference in accepting students (*Cannon* Vol. I at 21-22; *Cannon* Ex. 1, p. 3), and in charging tuition. (*Cannon* Vol. I at 85; *Cannon* Ex. 5). The official policy of the Archdiocese

calls for a religious preference in the hiring of teachers. (*Kropog* Vol. II at 7-8; *Kropog* Ex. 18, p. 17). The contracts of principals and teachers in the schools of the Archdiocese contain a provision allowing termination for life-style contrary to the teachings of the Catholic church. (*Kropog* Vol. II at 13-14; *Kropog* Ex. 14, Sections A 1230.02, A 2130.06).

The schools require attendance at daily religion classes; some excuse non-Catholics, some do not. (*Cannon* Vol. I at 30; *Kropog* Vol. I at 58; *Junkin* at 56-58). The schools conduct sacramental preparation classes during the school day. (*Kropog* Vol. I at 165). The schools also require attendance at Mass (*Cannon* Vol. I at 29; *Kropog* Vol. I at 37; *Junkin* at 60). Religious extracurricular activities are also provided. (*Kropog* Vol. I at 171-72).

The Archdiocese and the individual schools publish statements of philosophy under which the schools operate. (*Cannon* Exs. 1, 2, 3; *Kropog* Exs. 11, 12, 14; *Junkin* Exs. 1, 2-11, 13-15, 16-20, 22-24, 29, 31-33, 35, 37-40). These statements indicate the pervasive sectarian nature of the schools and provide that the schools are institutions in which "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious beliefs is consistently maintained." *Felton*, 473 U.S. at 412, quoting *Meek v. Pittenger*, 421 U.S. at 371.

The St. Anthony School Handbook, for instance, states in its introduction:

> Catholic education is intended to make men's faith become living, conscious and active through the light of instruction. The Catholic

> school is the unique setting within which this ideal can be realized in the lives of the Catholic children and young people.

Only in such a school can they experience learning and living fully integrated in the light of faith. . . . Here, too, instruction in religious truth and values in an integral part of the school program. It is not one more subject along side the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

(*Cannon* Ex. 3, p. 2) (*see also Jenkins* Exs. 8-14, 16-20, 22-24, 29, 31-33, 35, 37-40).

The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans indicates that the operation of the Catholic schools is governed by canon law. (*Jenkins* Ex. 22, pp. 1-4). The handbook lists the goals and objectives of the Catholic schools. It states: "Broad goals of the Catholic school are to teach the gospel message, to build communities, to be of Christian service and to worship together." (*Id.* at p. 4).

It lists the major objectives of the Catholic schools as follows:

> To work closely with the home in educating children towards the fullness of Christian life.
>
> To specifically teach Catholic principles and Christian values.
>
> To offer personal experiences in Christian living through liturgy, sacramental life, prayer, guidance, and example. To instruct in human knowledge and skills which enable students to

actively participate in the parish community and its society.

To recognize the dignity of the person.

To encourage teachers to become committed Christians and to develop professional competence.

(*Jenkins* Ex. 22, p. 5).

As the Plaintiffs state, the handbooks of the parochial schools in Jefferson Parish evidence that the schools under the control of the Archdiocese are pervasively sectarian. The Handbook of Policies and Regulations for Elementary Schools refers to the pastor as "the spiritual and temporal shepherd of the parish" and states that "[h]e is the key person in relation to the parish education program." The pastor has "authority at the parish level" to veto decisions made by the local school board. (*Jenkins* Exhibit 22 at p. 10).

Under the Archdiocesan policy, "Catholic schools of the Archdiocese are open to all children regardless of race or ethnic background, but emphasis should be given to Catholic children." Additionally, the majority of the schools operated by the Archdiocese located in Jefferson Parish have one or more religious symbols located within the structure itself, including crucifixes, which are in the classrooms because the schools are religious. (*Jenkins* Dep., p. 106-110).

Mr. Howard Jenkins (Jenkins), the Superintendent of the parochial school system for the Archdiocese of New Orleans, indicated that a majority of the schools operated by the Archdiocese and located in Jefferson Parish require that students attend religion classes, and that the

majority of those schools have some type of attendance requirement at exercises such as liturgies and prayer services. (*Jenkins* at 106-08).

He also indicated that teachers employed at those schools are normally required to accompany their students to Mass. Further, the Plaintiffs illustrate that virtually every handbook of the Archdiocesan schools reveals the pervasive religious character of the schools. (See, *Jenkins* Exs. 1-35).

After reviewing each of the 35 exhibits, the Court finds that the schools operated under the auspices of the Archdiocese, the majority of the schools receiving Chapter 2 aid, are pervasively sectarian. Further support for this finding is provided by the Court in *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562, 2574-78 (1988), where Justice Rehnquist stated that church affiliated elementary and secondary schools are, by their nature, deemed to be pervasively sectarian, while church affiliated colleges and universities are not. *Id.* 2574-78.

Leaving the analysis of the pervasive sectarianism of the majority of the nonpublic schools, we return to the remainder of the *Lemon* test.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court struck down a Pennsylvania statute which authorized the loan of instructional materials and equipment to nonpublic elementary and secondary schools. The Court found that the Act had the "primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act." *Meek*, 421 U.S. at 363. The Court found that such aid to sectarian schools was "neither indirect nor incidental." *Id.* at 365. In *Meek*,

"instructional equipment" was defined to include projectors, tape recorders, laboratory equipment, and "any other educational, secular, neutral, nonideological equipment." *Id.* at 354, n. 4. "Instructional material" was defined to include books, periodicals, filmstrips, film, records, tapes, and other similar material. *Id.*

The Court stated that even though the material and equipment was "self-policing, in that starting as secular, nonideological and neutral, they will not change in use, . . . it would simply ignore reality to attempt to separate the secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then to characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian." *Id.* at 365.

The program in *Meek* involved just under $12 million dollars of direct aid to predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. *Id.* at 365. Of the 1,320 nonpublic schools in Pennsylvania that qualified for aid under Act 195, more than 75% were church-related or religiously affiliated educational institutions. This amounts to approximately $9,090 per school, and the *Meek* Court firmly determined that this aid was "neither indirect nor incidental". *Id.*

Two years later, the Court in *Wolman v. Walter,* 433 U.S. 229 (1977), refused to deviate from the substance of the holding in *Meek* based upon the formalistic differences in the operation of the Ohio program challenged.

The program in *Wolman* authorized the loan of instructional equipment and materials to the parents of nonpublic school students. The material to be lent was limited to that which was used in public schools and which was "incapable of diversion to religious use." *Wolman*, 433 U.S. at 248.

In *Wolman*, the instructional materials and equipment included projectors, record players, tape recorders, maps, globes, science kits, and weather forecasting charts. *Id.* at 229. In *Public Funds for Public Schools of N.J. v. Marburger*, 358 F.Supp. 29, 34, n. 2 (D.N.J.1973), *aff'd.*, 417 U.S. 961 (1974), "instructional materials" included tapes, discs, films, filmstrips, books, periodicals, and maps. "Supplies" were defined to include, among others, pencils, paper, crayons and paint. *Id.* Equipment included projectors, televisions, tape recorders, projection screens, and other similar equipment. *Id.* at 38.

Chapter 2 fails the second prong of the *Lemon* test because due to the pervasive sectarian nature of the schools affected by the aid, the aid "inescapably ha[s] the primary effect of providing a direct and substantial advancement of the sectarian enterprise". *Wolman*, 433 U.S. 229, 250.

Leaving the examination of the second part of the *Lemon* test, advancement of religion, the third part will be addressed, that of excessive entanglement. In *Meek* and *Wolman*, the Courts did not address the issue of monitoring the use of materials and equipment by the nonpublic schools. However, in *Marburger*, a state program involving loans to nonpublic schools of instructional materials, equipment, and supplies was struck down. The Court

expressed concern over the issue of entanglement. The materials had the susceptibility of diversion to religious use. The Court stated that a constant and continuous review and control of the manner in which the items were being used would have to be undertaken. *Id.* at 36, 40.

The New Jersey statute prohibited the loan of materials for use in sectarian religious courses or devotional exercises. However, the Court found this restriction ineffective in saving the constitutionality of the program because the enforcement of the limitations on the use of the funds would require a continuing and intolerable government presence in the affairs of the church. *Id.* at 38-39.

One of the key factors which allowed the Court to uphold the textbook loan program was the fact that the textbooks were approved as to their nonsectarian content before they were lent. *Meek*, 421 U.S. at 351-55. However, there is no such safeguard with respect to the library books lent under the Chapter 2 program.

The Chapter 2 challenge at issue in the current case, as well as the state equipment and materials statute, La.Rev.Stat. Sections 17:351-52, are similar to the statutes found unconstitutional in *Meek*, *Wolman*, and *Marburger*. The aid provided pursuant to the two statutes is unconstitutional according to the cases of *Meek*, *Wolman*, and *Marburger*. First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion. Notably, both the defendants and the plaintiffs moved for summary judgment regarding this issue, stating that no

issues of material fact remain regarding the Chapter 2 challenge. Therefore, the Court finds this issue proper for summary judgment at this time. Accordingly,

IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54 be, and the same is hereby, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, 20 U.S.C. Sections 2701-3341, and La.Rev.Stat. Sections 17:351-54 be, and the same are hereby, DENIED.

APPENDIX D

Mary L. HELMS, individually and as next friend of Amy T. Helms; Amy T. Helms, a minor; Marie L. Schneider,
Plaintiffs-Appellants-Cross-Appellees-Appellees,
v.
Cecil J. PICARD, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education; Jefferson Parish School Board System; Elton Lagasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; Libby Moran, Vice President and member of the Jefferson Parish School Board; Robert Wolfe, member of the Jefferson Parish School Board; Barry Bordelon, member of the Jefferson Parish School Board; O.H. Guidry, member of the Jefferson Parish School Board; Cedric Floyd, member of the Jefferson Parish School Board; Polly Thomas, member of the Jefferson Parish School Board; Gene Katsanis, member of the Jefferson Parish School Board; Martin Marino, member of the Jefferson Parish School Board,
Defendants-Appellees-Cross-Appellants,
and
Richard W. Riley, Secretary of the United States Department of Education; United States Department of Education, Defendants-Appellees,
and Special Education Services Corporation,
Defendant-Appellant,
and
Guy Mitchell; Jan Mitchell; Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton, Darlene Thornton,
Intervenor Defendants-Appellees-Cross-Appellants.
No. 97-30231.

United States Court of Appeals,
Fifth Circuit.
Jan. 13, 1999.

Lee Boothby, Boothby & Yingst, Washington, DC, for Mary and Amy Helms and Marie Schneider.

Patricia Ann Dean, Andrew Tanner Karron, Arnold & Porter, Washington, DC, William Thomas D'Zurilla, Gordon, Arata, McCollam & Duplantis, New Orleans, LA, for Guy and Jan Mitchell, Claire Friedrichs, Eddie and Colleen Greer and Dennis and Darlene Thornton.

Howard S. Scher, Drake Stephen Cutini, Matthew Miles Collette, U.S. Dept. of Justice, Civil Div., Appellate Staff, Washington, DC, for Richard Riley and U.S. Dept. of Educ.

Jack A. Grant, Andree Hunter Greenleaf, Grant & Barrow, Gretna, LA, for Lagasse, Rolling, Moran, Wolfe, Bordelon, Guidry, Floyd, Thomas, Katsanis, Marino and Jefferson Parish Sch. Bd. System.

David Glen Sanders, Asst. Atty. Gen., Division of Litigation, Baton Rouge, LA, for Picard, Duncan and Louisiana State Bd. of Elementary and Secondary Educ.

Marshall Beil, Catherine A. Rogers, Ross & Hardies, New York City, for National Committee for Public Educ. and Religious Liberty, Amicus Curiae.

Marjorie Ruth Esman, New Orleans, LA, Kenneth M. Dreifach, Morrison & Foerster, New York City, for The American Civil Liberties Union and Anti-Defamation League, Amicus Curiae.

Thomas A. Rayer, Sr., Denechaud & Denechaud, New Orleans, LA, for Special Educ. Services Corp.

Appeals from the United States District Court for the Eastern District of Louisiana; Marcel Livaudais, Jr., Judge.

Before DUHE, BENAVIDES and STEWART, Circuit Judges.[1]

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC
(Opinion 8/17/98, 5 Cir., 97-30231, 151 F.3d 347)

PER CURIAM:

The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R.App. P and 5th Cir. R. 35) the Suggestions for Rehearing En Banc are also DENIED.

For clarity, we amend that part of the last sentence of the panel opinion following the number (2) to read as follows:

> " . . . (2) we REVERSE the district court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, 20 U.S.C. §§ 7301-7373, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52, are unconstitutional as applied in Jefferson Parish, except as applied for the acquisition of textbooks which use is not challenged by this litigation; and (3). . . . "

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[1] Judges Wiener and Dennis did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX E

SUBCHAPTER VI – INNOVATIVE EDUCATION PROGRAM STRATEGIES

20 U.S.C. § 7301. Findings and statement of purpose

(a) Findings

The Congress finds that division 2 of subchapter I of chapter 47 of this title [20 U.S.C.A. § 2911 et seq.] (as such division was in effect on the day preceding October 20, 1994) has been successful in achieving the goals of increasing local flexibility, reducing administrative burden, providing services for private school students, encouraging innovation, and contributing to the improvement of elementary and secondary educational programs.

(b) Statement of purpose

It is the purpose of programs under this subchapter –

(1) to support local education reform efforts which are consistent with and support statewide reform efforts under Goals 2000: Educate America Act;

(2) to support State and local efforts to accomplish the National Education Goals;

(3) to provide funding to enable State and local educational agencies to implement promising educational reform programs;

(4) to provide a continuing source of innovation, and educational improvement, including support for library services and instructional and media materials; and

(5) to meet the special educational needs of at risk and high cost students.

(c) State and local responsibility

The basic responsibility for the administration of funds made available under this subchapter is within the State educational agencies, but it is the intent of Congress that the responsibility be carried out with a minimum of paperwork and that the responsibility for the design and implementation of programs assisted under this subchapter will be mainly that of local educational agencies, school superintendents and principals, and classroom teachers and supporting personnel, because such agencies and individuals have the most direct contact with students and are most likely to be able to design programs to meet the educational needs of students in their own school districts.

20 U.S.C. § 7302. Authorization of appropriations; duration of assistance

(a) Authorization

To carry out the purposes of this subchapter, there are authorized to be appropriated $370,000,000 for fiscal year 1995 and such sums as may be necessary for each of the four succeeding fiscal years.

(b) Duration of assistance

During the period beginning October 1, 1994, and ending September 30, 1999, the Secretary shall, in accordance with the provisions of this subchapter, make payments to State educational agencies for the purpose of this subchapter.

20 U.S.C. § 7303. "Effective schools programs" defined

For the purposes of this subchapter the term "effective schools programs" means school-based programs that may encompass preschool through secondary school levels and that have the objectives of (1) promoting school-level planning, instructional improvement, and staff development, (2) increasing the academic achievement levels of all children and particularly educationally disadvantaged children, and (3) achieving as ongoing conditions in the school the following factors identified through effective schools research as distinguishing effective from ineffective schools:

(A) Strong and effective administrative and instructional leadership that creates consensus on instructional goals and organizational capacity for instructional problem solving.

(B) Emphasis on the acquisition of basic and higher order skills.

(C) A safe and orderly school environment that allows teachers and pupils to focus their energies on academic achievement.

(D) A climate of expectation that virtually all children can learn under appropriate conditions.

(E) Continuous assessment of students and programs to evaluate the effects of instruction.

20 U.S.C. § 7311. Allotment to States

(a) Reservations

From the sums appropriated to carry out this subchapter in any fiscal year, the Secretary shall reserve not to exceed one percent for payments to outlying areas to be allotted in accordance with their respective needs.

(b) Allotment

From the remainder of such sums, the Secretary shall allot to each State an amount which bears the same ratio to the amount of such remainder as the school-age population of the State bears to the school-age population of all States, except that no State shall receive less than an amount equal to one-half of one percent of such remainder.

(c) Definitions

For purposes of this part:

(1) The term "school-age population" means the population aged 5 through 17.

(2) The term "States" includes the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

20 U.S.C. § 7312. Allocation to local educational agencies

(a) Distribution rule

From the sums made available each year to carry out this subchapter, the State educational agency shall distribute not less than 85 percent to local educational agencies within such State according to the relative

enrollments in public and private, nonprofit schools within the school districts of such agencies, adjusted, in accordance with criteria approved by the Secretary, to provide higher per pupil allocations to local educational agencies which have the greatest numbers or percentages of children whose education imposes a higher than average cost per child, such as –

(1) children living in areas with high concentrations of low-income families;

(2) children from low-income families; and

(3) children living in sparsely populated areas.

(b) Calculation of enrollments

(1) In general

The calculation of relative enrollments under subsection (a) of this section shall be on the basis of the total of –

(A) the number of children enrolled in public schools; and

(B) the number of children enrolled in private non-profit schools that desire that their children participate in programs or projects assisted under this subchapter, for the fiscal year preceding the fiscal year for which the determination is made.

(2) Construction

Nothing in this subsection shall diminish the responsibility of local educational agencies to contact, on an annual basis, appropriate officials from private nonprofit schools within the

areas served by such agencies in order to determine whether such schools desire that their children participate in programs assisted under this part.

(3) Adjustments

(A) Relative enrollments under subsection (a) of this section shall be adjusted, in accordance with criteria approved by the Secretary under subparagraph (B), to provide higher per pupil allocations only to local educational agencies which serve the greatest numbers or percentages of –

(i) children living in areas with high concentrations of low-income families;

(ii) children from low-income families; or

(iii) children living in sparsely populated areas.

(B) The Secretary shall review criteria submitted by a State educational agency for adjusting allocations under paragraph (1) and shall approve such criteria only if the Secretary determines that such criteria are reasonably calculated to produce an adjusted allocation that reflects the relative needs within the State's local educational agencies based on the factors set forth in subparagraph (A).

(c) Payment of allocations

(1) Distribution

From the funds paid to a State educational agency pursuant to section 7302 of this title for a fiscal year, a State educational agency shall distribute to each eligible local educational agency

which has submitted an application as required in section 7332 of this title the amount of such local educational agency allocation as determined under subsection (a) of this section.

(2) Additional funds

(A) Additional funds resulting from higher per pupil allocations provided to a local educational agency on the basis of adjusted enrollments of children described in subsection (a) of this section, may, at the discretion of the local educational agency, be allocated for expenditures to provide services for children enrolled in public and private nonprofit schools in direct proportion to the number of children described in subsection (a) of this section and enrolled in such schools within the local educational agency.

(B) In any fiscal year, any local educational agency that elects to allocate such additional funds in the manner described in subparagraph (A) shall allocate all additional funds to schools within the local educational agency in such manner.

(C) The provisions of subparagraphs (A) and (B) may not be construed to require any school to limit the use of such additional funds to the provision of services to specific students or categories of students.

20 U.S.C. § 7331. State uses of funds

(a) Authorized activities

A State educational agency may use funds made available for State use under this subchapter only for –

(1) State administration of programs under this subchapter including –

(A) supervision of the allocation of funds to local educational agencies;

(B) planning, supervision, and processing of State funds; and

(C) monitoring and evaluation of programs and activities under this subchapter; and

(2) technical assistance and direct grants to local educational agencies and statewide education reform activities including effective schools programs which assist local educational agencies to provide targeted assistance.

(b) Limitations and requirements

Not more than 25 percent of funds available for State programs under this subchapter in any fiscal year may be used for State administration under subsection (a)(1) of this section.

20 U.S.C. § 7332. State applications

(a) Application requirements

Any State which desires to receive assistance under this part shall submit to the Secretary an application which –

(1) designates the State educational agency as the State agency responsible for administration and supervision of programs assisted under this subchapter;

(2)(A) provides for a biennial submission of data on the use of funds, the types of services furnished, and the students served under this subchapter; and

(B) in fiscal year 1998 provides for an evaluation of the effectiveness of programs assisted under this subchapter;

(3) sets forth the allocation of such funds required to implement section 7372 of this title;

(4) provides that the State educational agency will keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this section);

(5) provides assurance that, apart from technical and advisory assistance and monitoring compliance with this subchapter, the State educational agency has not exercised and will not exercise any influence in the decisionmaking processes of local educational agencies as to the expenditure made pursuant to an application under section 7353 of this title;

(6) contains assurances that there is compliance with the specific requirements of this subchapter; and

(7) provides for timely public notice and public dissemination of the information provided pursuant to paragraph (2).

(b) Period of application

An application filed by the State under subsection (a) of this section shall be for a period not to exceed three

years, and may be amended annually as may be necessary to reflect changes without filing a new application.

(c) Audit rule

Local educational agencies receiving less than an average of $5,000 each under this subchapter shall not be audited more frequently than once every five years.

20 U.S.C. § 7351. Targeted use of funds

(a) General rule

Funds made available to local educational agencies under section 7312 of this title shall be used for innovative assistance described in subsection (b) of this section.

(b) Innovative assistance

The innovative assistance programs referred to in subsection (a) of this section include –

(1) technology related to the implementation of school-based reform programs, including professional development to assist teachers and other school officials regarding how to use effectively such equipment and software;

(2) programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program;

(3) promising education reform projects, including effective schools and magnet schools;

(4) programs to improve the higher order thinking skills of disadvantaged elementary and secondary school students and to prevent students from dropping out of school;

(5) programs to combat illiteracy in the student and adult population, including parent illiteracy;

(6) programs to provide for the educational needs of gifted and talented children;

(7) school reform activities that are consistent with the Goals 2000: Educate America Act; and

(8) school improvement programs or activities under sections 6317 and 6318 of this title.

20 U.S.C. § 7352. Administrative authority

In order to conduct the activities authorized by this subchapter, each State or local educational agency may use funds reserved for this subchapter to make grants to and to enter into contracts with local educational agencies, institutions of higher education, libraries, museums, and other public and private nonprofit agencies, organizations, and institutions.

20 U.S.C. § 7353. Local applications

(a) Contents of application

A local educational agency or consortium of such agencies may receive an allocation of funds under this

subchapter for any year for which an application is submitted to the State educational agency and such application is certified to meet the requirements of this section. The State educational agency shall certify any such application if such application –

(1)(A) sets forth the planned allocation of funds among innovative assistance programs described in section 7351 of this title and describes the programs, projects, and activities designed to carry out such innovative assistance which the local educational agency intends to support, together with the reasons for the selection of such programs, projects, and activities; and

(B) sets forth the allocation of such funds required to implement section 7372 of this title;

(2) describes how assistance under this subchapter will contribute to meeting the National Education Goals and improving student achievement or improving the quality of education for students;

(3) provide assurances of compliance with the provisions of this subchapter, including the participation of children enrolled in private, nonprofit schools in accordance with section 7372 of this title;

(4) agrees to keep such records, and provide such information to the State educational agency as reasonably may be required for fiscal audit and program evaluation, consistent with the responsibilities of the State agency under this subchapter; and

(5) provides in the allocation of funds for the assistance authorized by this subchapter,

and in the design, planning and implementation of such programs, for systematic consultation with parents of children attending elementary and secondary schools in the area served by the local educational agency, with teachers and administrative personnel in such schools, and with other groups involved in the implementation of this subchapter (such as librarians, school counselors, and other pupil services personnel) as may be considered appropriate by the local educational agency.

(b) Period of application

An application filed by a local educational agency under subsection (a) of this section shall be for a period not to exceed three fiscal years, may provide for the allocation of funds to programs for a period of three years, and may be amended annually as may be necessary to reflect changes without filing a new application.

(c) Local educational agency discretion

Subject to the limitations and requirements of this subchapter, a local educational agency shall have complete discretion in determining how funds under this part shall be divided among the areas of targeted assistance. In exercising such discretion, a local educational agency shall ensure that expenditures under this part carry out the purposes of this subchapter and are used to meet the educational needs within the schools of such local educational agency.

20 U.S.C. § 7371. Maintenance of effort; Federal funds supplementary

(a) Maintenance of effort

(1) In general

Except as provided in paragraph (2), a State is entitled to receive its full allocation of funds under this part for any fiscal year if the Secretary finds that either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the fiscal year preceding the fiscal year for which the determination is made was not less than 90 percent of such combined fiscal effort or aggregate expenditures for the second fiscal year preceding the fiscal year for which the determination is made.

(2) Reduction of funds

The Secretary shall reduce the amount of the allocation of funds under this part in any fiscal year in the exact proportion to which the State fails to meet the requirements of paragraph (1) by falling below 90 percent of both the fiscal effort per student and aggregate expenditures (using the measure most favorable to the State), and no such lesser amount shall be used for computing the effort required under paragraph (1) for subsequent years.

(3) Waivers

The Secretary may waive, for one fiscal year only, the requirements of this section if the Secretary determines that such a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a

precipitous and unforeseen decline in the financial resources of the State.

(b) Federal funds supplementary

A State or local educational agency may use and allocate funds received under this part only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this part, be made available from non-Federal sources, and in no case may such funds be used so as to supplant funds from non-Federal sources.

20 U.S.C. § 7372. Participation of children enrolled in private schools

(a) Participation on equitable basis

(1) In general

To the extent consistent with the number of children in the school district of a local educational agency which is eligible to receive funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located who are enrolled in private nonprofit elementary and secondary schools, or with respect to instructional or personnel training programs funded by the State educational agency from funds made available for State use, such agency, after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair,

minor remodeling, or construction of public facilities as may be necessary for their provision (consistent with subsection (c) of this section), or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.

(2) Other provisions for services

If no program or project is carried out under paragraph (1) in the school district of a local educational agency, the State educational agency shall make arrangements, such as through contracts with non-profit agencies or organizations, under which children in private schools in such district are provided with services and materials to the extent that would have occurred if the local educational agency had received funds under this subchapter.

(3) Application of requirements

The requirements of this section relating to the participation of children, teachers, and other personnel serving such children shall apply to programs and projects carried out under this subchapter by a State or local educational agency, whether directly or through grants to or contracts with other public or private agencies, institutions, or organizations.

(b) Equal expenditures

Expenditures for programs pursuant to subsection (a) of this section shall be equal (consistent with the number

of children to be served) to expenditures for programs under this subchapter for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other factors which relate to such expenditures, and when funds available to a local educational agency under this subchapter are used to concentrate programs or projects on a particular group, attendance area, or grade or age level, children enrolled in private schools who are included within the group, attendance area, or grade or age level selected for such concentration shall, after consultation with the appropriate private school officials, be assured equitable participation in the purposes and benefits of such programs or projects.

(c) Funds

(1) Administration of funds and property

The control of funds provided under this subchapter, and title to materials, equipment, and property repaired, remodeled, or constructed with such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and a public agency shall administer such funds and property.

(2) Provision of services

The provision of services pursuant to this subchapter shall be provided by employees of a public agency or through contract by such public agency with a person, an association, agency, or corporation who or which, in the provision of such services, is independent of such private school and of any religious organizations, and such employment or contract shall be under the control and supervision of such public agency,

and the funds provided under this subchapter shall not be commingled with State or local funds.

(d) State prohibition waiver

If by reason of any provision of law a State or local educational agency is prohibited from providing for the participation in programs of children enrolled in private elementary and secondary schools, as required by this section, the Secretary shall waive such requirements and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section.

(e) Waiver and provision of services

(1) Failure to comply

If the Secretary determines that a State or a local educational agency has substantially failed or is unwilling to provide for the participation on an equitable basis of children enrolled in private elementary and secondary schools as required by this section, the Secretary may waive such requirements and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of this section.

(2) Withholding of allocation

Pending final resolution of any investigation or complaint that could result in a determination under this subsection or subsection (d) of this section, the Secretary may withhold from the allocation of the affected State or local educational agency the amount estimated by the

Secretary to be necessary to pay the cost of those services.

(f) Determination

Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State or local educational agency to meet the requirements of subsections (a) and (b) of this section.

(g) Payment from State allotment

When the Secretary arranges for services pursuant to this section, the Secretary shall, after consultation with the appropriate public and private school officials, pay the cost of such services, including the administrative costs of arranging for those services, from the appropriate allotment of the State under this subchapter.

(h) Review

(1) Written objections

The Secretary shall not take any final action under this section until the State educational agency and the local educational agency affected by such action have had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why that action should not be taken.

(2) Court action

If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under paragraph (1), such agency

may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based this action, as provided in section 2112 of title 28.

(3) Remand to Secretary

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence and the Secretary may make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(4) Court review

Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set such action aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(i) Prior determination

Any bypass determination by the Secretary under division 2 of subchapter I of chapter 47, of this title (as such division was in effect on the day preceding October 20, 1994) shall, to the extent consistent with the purposes

of this subchapter, apply to programs under this subchapter.

20 U.S.C. § 7373. Federal administration

(a) Technical assistance

The Secretary, upon request, shall provide technical assistance to State and local educational agencies under this subchapter.

(b) Rulemaking

The Secretary shall issue regulations under this subchapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements and assurances required by this subchapter.

(c) Availability of appropriations

Notwithstanding any other provision of law, unless expressly in limitation of this subsection, funds appropriated in any fiscal year to carry out activities under this subchapter shall become available for obligation on July 1 of such fiscal year and shall remain available for obligation until the end of the subsequent fiscal year.

Supreme Court, U.S.
FILED
MAY 3 1999

(1) (2)

Nos. 98-1648 and 98-1671

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTION PRESENTED

Section 7351(b)(2) of Title 20 permits local educational agencies receiving federal financial assistance to lend secular, neutral, and nonideological instructional equipment, instructional materials, and library materials acquired with that federal assistance to religious schools for the benefit of their students, as part of a program also serving public school students and nonsectarian private school students. The question presented is whether, in analyzing the claim that 20 U.S.C. 7351(b)(2), as applied in this case, violates the Establishment Clause of the First Amendment, the court of appeals was limited to considering the nature of the equipment and materials lent to religious schools, or whether it should also consider safeguards intended to prevent such equipment and materials from being diverted to religious use.

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In the Supreme Court of the United States

No. 98-1648

GUY MITCHELL, ET AL., PETITIONERS

v.

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v.

MARY L. HELMS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

STATEMENT

1. This case involves an Establishment Clause challenge to the application, in Jefferson Parish, Louisiana, of a federal program that provides financial assistance to local educational agencies (LEAs) for education-improvement programs, and authorizes LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to private elementary and secondary schools, including religious schools, as part of a program that neutrally benefits students in public and private schools. The application of a related state program was also challenged. The federal program at issue here was substantially amended twice

during the course of this litigation and has had several titles; it is currently found at Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 55, as amended by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, §§ 6001-6403, 108 Stat. 3707-3716. See 20 U.S.C. 7301-7373. For simplicity we will refer to the federal program as "Title VI"; previous decisions in this case referred to it as "Chapter 2."[1]

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[1] When this lawsuit was commenced, the federal program was known as Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, Tit. V, Subtit. D, Ch. 2, 95 Stat. 469-480; see 20 U.S.C. 3811-3863 (1982). Subsequently, in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, the program was amended and redesignated as Chapter 2 of Title I of the ESEA. See 102 Stat. 203-219; 20 U.S.C. 2911-2976 (1988). In 1994, the program was again redesignated as Title VI of the ESEA, see 20 U.S.C. 7301-7373, as explained in the text. Unless otherwise indicated, references in this brief to provisions of Title 20 of the United States Code are to the current (1994) edition.

The current authorizations for appropriations and for disbursements by the Department of Education under Title VI extend through Fiscal Year 2000. See 20 U.S.C. 7302 (authorization through Fiscal Year 1999); 20 U.S.C. 1226a(a) (automatic one-year extension absent intervening legislation). If funds are appropriated for Title VI for Fiscal Year 2000, LEAs could expend those funds at the local level through Fiscal Year 2002. See 20 U.S.C. 1225(b). Therefore, the court of appeals' order prohibiting the loan of equipment and materials purchased with Title VI funds to religious schools is likely to affect LEAs, at a minimum, until September 30, 2002.

We have been advised that the President will shortly announce proposals for extensive revision of the ESEA upon the expiration of its current authorization. That proposed revision would not extend the authorization for Title VI in its current form. However, under the President's proposal, programs similar to many that are

Title VI authorizes financial assistance to LEAs and to state educational agencies (SEAs) to implement nine kinds of "innovative assistance" programs. See 20 U.S.C. 7351(a) and (b); see also Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Among the kinds of programs that may be implemented with Title VI funds are programs "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program." 20 U.S.C. 7351(b)(2). As pertinent here, LEAs may use Title VI funds to purchase computer hardware and software for instructional use; they may also use such funds to acquire supplemental instructional materials and library materials.[2]

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currently funded under Title VI, which would permit the loan to private schools, including religious schools, of computer hardware and software for instructional use, would be funded under an expanded Title III of the ESEA. Like Title VI, Title III currently permits LEAs to use federal funds for the acquisition of hardware and software for use in classrooms and school libraries, see 20 U.S.C. 6844(3), requires LEAs to allow religious schoolchildren to participate in the benefits of programs on an equitable basis, see 20 U.S.C. 8893(a)(1) and (b)(1)(D), and also requires that any benefits made available be secular, neutral, and nonideological, see 20 U.S.C. 8893(a)(2). It is anticipated that the proposed revision of Title III will contain similar provisions.

[2] When this case was commenced in 1985, the permitted purposes of financial assistance under the program were somewhat differently focused. In particular, the program then expressly permitted LEAs to use federal funds for (among other things) the

Title VI requires that LEAs ensure that children enrolled in private nonprofit schools (as well as those in public schools) have the opportunity to benefit from programs financed with Title VI assistance. See 20 U.S.C. 7312, 7372. Moreover, Title VI expenditures by LEAs for private schoolchildren must "be equal (consistent with the number of children to be served) to expenditures * * * for children enrolled in the public schools of the [LEA], taking into account the needs of the individual children and other factors which relate to such expenditures." 20 U.S.C. 7372(b).

Any benefit provided to children in private schools, however, must be secular, and must not take the place of any services, equipment, or materials that the pri-

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acquisition and utilization of "instructional equipment and materials suitable for use in providing education in academic subjects for use by children and teachers in elementary and secondary schools." 20 U.S.C. 3832(1)(B) (1982). LEAs could, at that time, use federal funds to purchase instructional equipment such as slide projectors, cassette players, and filmstrip projectors, as well as computers. As a result of the 1988 amendments, the statute no longer expressly authorizes LEAs to use federal funds to purchase "instructional equipment," but it does expressly authorize the acquisition of computer hardware for instructional purposes. 20 U.S.C. 2941(b)(2) (1988); 20 U.S.C. 7351(b)(2). Both before and after the 1988 amendments, Title VI permitted LEAs to lend computer equipment for instructional purposes to religious schools. Further, computer equipment lent to religious schools has been an important part of this case since the beginning. See Complaint ¶ 41 (Dec. 2, 1985) (challenging loan of microcomputers to private schools for use by teachers and students); First Amended Complaint ¶ 43 (Jan. 13, 1987) (same); Second Amended Complaint ¶ 50 (Nov. 1, 1988) (same). And, as explained above (note 1, *supra*), we anticipate that, under the President's proposed reauthorization and revision of the ESEA, LEAs would continue to have authority to lend computer hardware and software to private religious schools.

vate school would offer or obtain in the absence of federal assistance. Thus, Section 7372 expressly provides that LEAs "shall provide for the benefit of such children in such [private] schools *secular, neutral, and nonideological* services, materials, and equipment." 20 U.S.C. 7372(a)(1) (emphasis added); see also 20 U.S.C. 8897 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for religious worship or instruction."). Title VI also requires that the control of all Title VI funds "and title to materials, equipment, and property * * * shall be in a public agency * * * and a public agency shall administer such funds and property." 20 U.S.C. 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who, "in the provision of such services, is independent of such private school and of any religious organizations." 20 U.S.C. 7372(c)(2). Further, Title VI funds for innovative-assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Title VI funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. 7371(b).

An LEA that wishes to receive federal funds for a Title VI program must present an application to the pertinent SEA. The SEA is required to certify the LEA's application for funds if the application explains the planned allocation of funds among the nine kinds of programs permitted under the statute, sets forth the allocation of funds required to assure the equitable participation of private schoolchildren, and provides assurance of compliance with the statute's various requirements, including the requirement of participation of private schoolchildren in secular benefits under the

program. 20 U.S.C. 7353(a)(1)(A)-(B) and (3). The LEA must also agree to keep records sufficient to permit the SEA to evaluate the LEA's implementation of the program. 20 U.S.C. 7353(a)(4). The statute does not provide for review by the Department of Education of the LEA's application for Title VI funds.

The Department of Education's Title VI regulations emphasize the statute's limitations on assistance that may be provided to children at private schools. Those regulations explain that services obtained with federal funds must supplement, and not supplant, services that the private schools would otherwise provide their schoolchildren, 34 C.F.R. 299.8(a), and that the LEA must keep title to all property and equipment used for the benefit of private schoolchildren, 34 C.F.R. 299.9(a). In addition, the regulations require that the public agency "ensure that the equipment and supplies placed in a private school * * * [a]re used only for proper purposes of the program." 34 C.F.R. 299.9(c). As explained below, the Department has recently issued further guidance for LEAs on the participation of private schoolchildren in Title VI, addressing in particular procedures that LEAs should follow, and safeguards that LEAs should impose, to ensure that Title VI benefits afforded to private schoolchildren are secular. See pp. 15-16, *infra*.

2. In Louisiana, the State Bureau of Consolidated Educational Programs administers the Louisiana Title VI program. After Louisiana receives its Title VI funds from the federal government, the SEA allocates 80% of the funds to LEAs. Eighty-five percent of those funds is allocated to LEAs based on the number of participating elementary and secondary school students in both public and private schools, and 15% is allocated

based on the number of children from low-income families. Pet. App. 86a.[3]

For the school year 1984-1985 (immediately before this lawsuit was commenced), the Jefferson Parish Public School System (JPPSS) received $655,671 in Title VI funds. Approximately 70% of that money ($456,097) was used for equipment, materials, and services at public schools in the JPPSS, and the remaining amount ($199,574) was used for Title VI programs provided to students at private schools in the district. Pet. App. 86a. For the school year 1986-1987, the JPPSS received $661,148 in Title VI assistance. Approximately 32% of that amount ($214,080) was used to provide Title VI benefits to private schoolchildren in the district. Of the $214,080 budgeted for private schoolchildren, $94,758 was spent to provide library and media materials, and $102,862 was spent for instructional equipment. *Id.* at 90a. With respect to the State of Louisiana as a whole, about 25% of the total Title VI allotment was used for children in private schools. *Id.* at 86a.

The State of Louisiana, in administering Title VI, "never transmits dollars to [any] non-public school." Pet. App. 87a (brackets in original omitted). Moreover, because the statute requires that a public authority retain title to all Title VI equipment and materials, such resources are provided only on loan to private schools, and the ultimate authority and control over those items always rests with the public school system, not the private schools. *Ibid.*

The SEA and the LEA monitor the use of Title VI equipment and materials in private schools to determine whether they are used for purposes consistent

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[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 98-1648.

with Title VI, including the requirement that they be used only for secular purposes. Title VI Guidelines issued by the Louisiana SEA emphasize to the LEAs that "the LEA must ensure that [Title VI] equipment and materials * * * are used for secular, neutral and non-ideological purposes." Gov't Exh. D-4 in Opp. to Resp. Mot. for Summ. Judg. (State Guidelines) 22. The State Guidelines suggest that LEA representatives visit each private school site at least yearly and check the materials ordered to ensure that they are secular, neutral, and nonideological. *Ibid.* Representatives of the SEA visit each LEA every two years to monitor the LEA's implementation of the Title VI program, including the LEA's compliance with statutory requirements. Pet. App. 56a. In those monitoring visits, the SEA representatives examine whether the services, material, and equipment provided to private schools are secular, neutral, and nonideological. State Guidelines 22. In addition, the SEA encourages LEAs to have religious schools sign written assurances that Title VI equipment will not be used for religious purposes. *Id.* at 84; Pet. App. 87a. The JPPSS has also required signed assurances from each private school that material and equipment would be used in "direct compliance" with Title VI. Woodward Dep. Exh. 13; see Pet. App. 107a.

The record compiled below showed that, in Jefferson Parish, Ruth Woodward, the coordinator of Title VI programs in the JPPSS, notifies private schools each year of the allotment of Title VI funds available for services to students at those schools; those notices are accompanied by a reminder from the Director of the SEA that Title VI prohibits the acquisition of religiously oriented material. Woodward Dep. 62-63 & Exh. 3. Woodward also visits each private school every year

to discuss use of the Title VI equipment with a school official, such as the principal or a librarian, and to make sure that logs of use of Title VI equipment are kept, and that Title VI equipment is properly marked as such. *Id.* at 96-98, 102-103, 111. Woodward specifically inquires of private school officials whether the Title VI equipment and materials are used for secular, neutral, and nonideological purposes. *Id.* at 102, 111. Library books purchased for loan to private schools are personally approved by Woodward and another public school official from catalogues; they also personally review all requests by private schools for library books and other instructional materials, such as videocassettes and filmstrips, and delete titles that might indicate religiously oriented materials. *Id.* at 38, 88-89; Pet. App. 57a.[4]

3. On December 2, 1985, plaintiffs Mary Helms, Amy Helms, and Marie Schneider (hereafter respondents) brought suit in district court against federal, state, and local officials, claiming that several federal, state, and local programs as applied in Jefferson Parish, Louisiana, including Title VI, violated the Establishment Clause.[5] Respondents did not challenge Title VI on its

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[4] This monitoring by state and local officials revealed occasional lapses from Title VI's requirement of secularity, which were corrected. Woodward on one occasion discovered that 191 books purchased and lent to religious school libraries were in violation of Title VI guidelines. Those books were recalled and donated to a public library. Pet. App. 51a, 91a. A monitoring visit by the SEA to JPPSS also revealed a possible inappropriate purchase of a religious book for a religious school library, which led to a recommendation by the SEA that JPPSS be more careful in its oversight of Title VI, but investigation by Woodward disclosed that the book in question had not in fact been purchased with Title VI funds. *Id.* at 90a-91a.

[5] Although the other challenged programs were the subject of extensive decisions in both lower courts, they are not directly per-

face. Rather, they contended that one provision, authorizing federal funds to be used for the purchase of instructional equipment and materials, had been unconstitutionally applied in the Parish because such equipment and materials had been "transferred to nonpublic schools for their use." Second Amended Complaint ¶ 50 (Nov. 1, 1988). Respondents argued that this loan of instructional equipment and materials to private schools violated the Establishment Clause because (a) there were allegedly no safeguards in place to prevent the property lent to the private schools from being used for religious purposes, and (b) any monitoring that would be useful in preventing the use of instructional equipment for religious purposes would create an excessive entanglement between the government and private religious schools. *Id.* ¶ 52.

After discovery, the parties cross-moved for summary judgment on the constitutionality of the Title VI program in the Parish. In 1990, the district court initially concluded that the program was unconstitutional, and granted summary judgment to respondents on that issue. Pet. App. 137a-151a. The court concluded (*id.* at 148a-150a) that the practice of providing instructional equipment and materials to religious schools was controlled by this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), *Wolman* v. *Walter*, 433 U.S. 229 (1977), and *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), which had invalidated state programs that provided instructional equipment and materials to religious schools.

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tinent to respondents' challenge to Title VI discussed herein, and will not be further addressed in this brief.

The government moved for reconsideration, and on January 28, 1997, the district court reversed itself and upheld the Title VI program as applied in Jefferson Parish. Pet. App. 82a-108a. The court relied heavily on the Ninth Circuit's then-recent decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" (Pet. App. 107a) Title VI program under which instructional equipment, including computers, was lent to religious private schools. The court emphasized that, as in *Walker*, the instructional equipment and materials lent to the private schools in Jefferson Parish were secular, that Title VI benefits were made available to students on a neutral basis and without reference to religion, and that all the monitoring controls in effect in *Walker* were also in effect in Jefferson Parish: library books and other instructional materials are prescreened by the LEA; most parochial schools sign a pledge agreeing not to use the materials for religious purposes; an LEA official visits the private schools every year; the SEA also monitors the LEA's implementation of the program; and no Title VI money is ever paid directly to religious schools. *Ibid.* In light of those factors, the court found that the Title VI program in Jefferson Parish "does not have as its principal or primary effect the advancement or inhibition of religion." *Id.* at 108a.

4. Respondents appealed to the Fifth Circuit. The court of appeals reversed, and held that Jefferson Parish's Title VI program, insofar as it was applied to provide instructional equipment and materials and library materials to religious schools, was unconstitutional under this Court's decisions in *Meek* and *Wolman*. Pet. App. 53a-71a. The Fifth Circuit expressly disagreed with the Ninth Circuit's *Walker* decision

upholding "a [Title VI] program that was, in all relevant respects, identical to the one * * * in Jefferson Parish." *Id.* at 59a.

After examining this Court's decisions regarding aid to religious schools and students, particularly *Meek*, *Wolman*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the court of appeals concluded that those decisions "drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself." Pet. App. 66a. Whereas *Allen* had upheld the loan of textbooks to religious school students, *Meek* and *Wolman*, "while both reaffirming *Allen*, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren." *Id.* at 67a. The court of appeals also concluded that the "boundary lines" between permissible and impermissible assistance based entirely on the character of the aid were reaffirmed by *Regan*, which upheld aid to religious schools for the administration of standardized tests developed and required by the State, and which "clarified that *Meek* only invalidates a particular kind of aid to parochial schools—the loan of instructional materials." *Id.* at 68a.

The court rejected two arguments that these absolute "boundary lines" based on the character of the aid are inapplicable to this case. First, it concluded that the Ninth Circuit in *Walker* had erred in attempting to distinguish *Meek* and *Wolman* on the ground that the programs struck down in those cases "directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated," whereas Title VI is a "neutral, generally applicable statute that provides

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6. In February 1999, the Department of Education issued amended Guidance for SEAs and LEAs on various aspects of Title VI, including the statutory requirement that all services, equipment, and materials made available to private school students be secular, neutral, and nonideological. See App., *infra*, 1a-9a.[7] The Guidance explains that LEAs "should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children." *Id.* at 4a. First, "it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school." *Ibid.* To that end,

> LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Ibid.

Second, the Guidance makes clear that the LEA "is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes." App., *infra*, 4a. Thus, the LEA should "determine that any Title VI materials * * * are secular, neutral and nonideological[,] * * * mark all equipment and materials purchased with Title VI

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[7] A complete copy of this Guidance has been lodged with the Clerk.

funds so that they are clearly identifiable as Title VI property of the LEA[, and] * * * perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of the equipment and materials, discussions with private school officials, and a review of any logs maintained." *Id.* at 4a-5a. The Guidance also states that the Department of Education believes that, to monitor compliance with the requirements of Title VI, "it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools." *Id.* at 4a. Furthermore, the Guidance emphasizes that LEAs "need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use." *Id.* at 5a.

ARGUMENT

The court of appeals has read this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Wolman* v. *Walter*, 433 U.S. 229 (1977), to require invalidation of an Act of Congress, insofar as that statute has been applied to authorize the loan of instructional equipment, instructional materials, and library materials for the benefit of religious school students. Moreover, the court of appeals held that invalidation of the program was compelled by the character of the aid alone, irrespective of whether the aid was accompanied by safeguards with the purpose and effect of preventing the equipment and materials lent to religious schools from being diverted to religious purposes. That decision impairs the implementation of Title VI in the Fifth Circuit, and the decision's reasoning is likely to have similar adverse effects on other federal programs

designed to ensure that all schoolchildren—including those in religious schools as well as public schools and private nonreligious schools—have access to computers in their classrooms and school libraries. The court of appeals' decision also conflicts directly with a decision of the Ninth Circuit upholding a similar program. This Court's review is therefore warranted.

Further, while *Meek* and *Wolman* may be read as the court of appeals read them, we submit that neither the reasoning of those cases nor what this Court has identified as the fundamental principles of the Establishment Clause necessarily requires a categorical rule prohibiting the loan of all instructional equipment and materials to religious schools, without regard to whether the aid is accompanied by safeguards to prevent its diversion to religious purposes, or whether the aid is supplementary rather than a direct subsidy of the religious school's core educational program. The Court should therefore grant review to consider whether a categorical ban on lending secular instructional equipment and materials to religious schools should not apply where (a) the aid is accompanied by safeguards adequate to protect against its diversion to religious purposes, (b) the aid is only supplementary to the school's core educational functions, and (c) the aid provided to the religious school is part of a program that serves all students in public and nonprofit private schools, in a neutral and equitable fashion.

1. The court of appeals read this Court's decisions in *Meek* and *Wolman* as establishing a categorical prohibition against lending instructional equipment or materials or library materials purchased with public funds to religious schools. The court of appeals therefore rejected the argument that such loans of equipment and materials could be made if they supplemented, rather

than supplanted, the basic educational function of the schools, and if safeguards were established to prevent the diversion of the loaned materials to religious purposes.

Although that decision did not invalidate 20 U.S.C. 7351(b)(2) on its face, but rather held only that its particular application in Jefferson Parish was unconstitutional, as a practical matter it impairs the effectiveness of Title VI in the Fifth Circuit, insofar as that statute requires that religious school students be permitted to participate equitably in its benefits. See 20 U.S.C. 7372(b). Title VI sets forth nine kinds of innovative-assistance programs that may be implemented with federal financial assistance. See 20 U.S.C. 7351(b); Charter School Expansion Act of 1998, Pub. L. No. 105-278, § 2(2), 112 Stat. 2682. Experience has shown, however, that often the Title VI program most useful for private schoolchildren is precisely the kind of program invalidated by the court of appeals in this case, funded under 20 U.S.C. 7351(b)(2), which permits the loan of instructional materials and equipment, especially computer hardware and software, as well as library materials.[8] That sort of program also directly advances the important federal interest in ensuring

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[8] In school year 1997-1998, $16,472,226 was allocated in Title VI funds for programs serving students at private, nonprofit schools in 34 States. Of that amount, $12,513,910, or 76%, was used for instructional and educational materials. U.S. Dep't of Education, *Elementary and Secondary Education Act (ESEA): Title VI: Innovative Education Program Strategies, National Compendium of State and Local Activities, 1997-1998 School Year* 2.3 (Feb. 1999) (lodged with the Clerk). In Louisiana, of $572,751 allocated for private schoolchildren in the same year, $522,183, or 91%, was used for instructional and educational materials. See *id.* at 2.27.

that all schoolchildren have access to new technologies in instructional and library settings.[9]

The program at issue here provides for the loan of instructional equipment and materials to the private school, for use by students there. Because of resource constraints, it is not feasible to provide this kind of assistance by lending computers or software directly to each student, in a manner similar to the textbook-loan program upheld in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[10] Nor, for the same reason, is it feasible to hire public school teachers to supervise the use of

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[9] Although Section 7351(b) theoretically permits the LEA to use federal funds for other kinds of programs, some of those other programs may in some circumstances present Establishment Clause concerns in the religious school setting, because they anticipate that the benefits be provided directly to the school, rather than to the schoolchildren. See 20 U.S.C. 7351(b)(3) (educational reform projects), (7) (school reform), and (9) (school improvement programs).

[10] For Fiscal Year 1999, Congress appropriated $375,000,000 to carry out the pertinent innovative-assistance programs under Title VI. See Department of Education Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, Tit. III, § 101(f), 112 Stat. 2681-368. We are informed by the Department of Education that approximately 53,400,000 students received Title VI services in school year 1994-1995 (the latest year for which such statistics were available). That number of students may be slightly overstated, because some students may receive services under more than one Title VI program, but it is believed to be a reasonably accurate estimate of the total number of students receiving Title VI services. Therefore, Congress has appropriated, for Title VI, about $7 per student. See also Pet. App. 63a n.18 (court of appeals noting that San Francisco Title VI program provided $6.65 in benefits per student). While that amount may be sufficient to provide students at each private school with a few items of equipment and materials, it is not sufficient to provide individual students with software or computer equipment.

Title VI instructional equipment and materials by students at religious schools, so as to bring the program under *Agostini* v. *Felton*, 521 U.S. 203 (1997), which permits public schoolteachers to give instruction to religious school students in religious school buildings.[11] In practical effect, therefore, the court of appeals has invalidated a form of federal assistance that is highly relevant for private schoolchildren, and also central to the effort to bring modern technology to all students.

Thus, although the court of appeals' decision does not prohibit the Secretary of Education from distributing funds under the statute to Louisiana for further distribution to LEAs in the State (including Jefferson Parish), it does restrict LEAs' ability to provide Title VI benefits to children who attend religious schools. Under the court of appeals' ruling, LEAs may find it difficult to comply with the statutory requirement that they ensure that private schoolchildren participate equitably in the benefits of Title VI. See 20 U.S.C. 7372(a)(1). The adverse consequences of the court of appeals' decision for the equitable participation of children in religious schools in the benefits of Title VI warrant this Court's review.

In addition, the kind of assistance that the court of appeals has invalidated is precisely the sort of assistance that will be even more important in the future, in the effort to make computer-assisted learning available to all children. For example, we are informed that the President will shortly propose a comprehensive revi-

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[11] For the same reasons, it would also be difficult, if not impossible in many instances, to hire public school teachers to give religious school students benefits under other Title VI programs, such as those designed to improve higher-order thinking skills or to combat illiteracy. See 20 U.S.C. 7351(b)(4) and (5).

sion of the ESEA that would establish a program specifically designed to provide advanced computer technologies to students, including students in religious schools. See note 1, *supra*. Although the court of appeals' decision invalidates only a particular program under the current Title VI, its reliance on *Meek* and *Wolman* for a broad ruling that no instructional materials or equipment of any kind may be lent to religious schools creates a serious question as to whether LEAs may continue to provide computer hardware and software under either the current version of Title III, see 20 U.S.C. 6844(3), or the revision of it to be proposed by the President.

2. The court of appeals' decision conflicts directly with the Ninth Circuit's decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld a "virtually indistinguishable" Title VI program (Pet. App. 107a). In that case, as in this one, private schools were lent instructional equipment and materials, including computer equipment; the schools were also lent library books and instructional materials, selected from prescreened lists to ensure their secularity. *Ibid.* The Ninth Circuit upheld the program, concluding in particular that it did not have the primary effect of advancing religion because the benefits under the program were available on a neutral basis without reference to religion, and because "controls are in place to prevent [Title VI] benefits from being diverted to religious instruction." 46 F.3d at 1467.

The Ninth Circuit's decision is not distinguishable from the Fifth Circuit's decision in this case on the ground that the Ninth Circuit found that the San Francisco program had adequate controls to prevent the diversion of instructional equipment to religious pur-

poses.[12] With one possible exception, those controls do not appear to have been significantly different from the controls in place in Jefferson Parish.[13] Indeed, even though the court of appeals in this case was aware that the program in *Walker* had in place various controls, it found the two programs to be, "in all relevant respects, identical." Pet. App. 59a.

More importantly, under the court of appeals' rationale in this case, the existence or extent of any such controls is simply irrelevant to the constitutional question, for the Fifth Circuit read *Meek* and *Wolman*

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[12] The Ninth Circuit did not consider the case before it to be controlled by *Meek* and *Wolman* in part because it read this Court's subsequent decisions as undermining those decisions. 46 F.3d at 1464-1466. We do not suggest that the Ninth Circuit properly concluded that it was not bound by *Meek* and *Wolman*. See *Agostini*, 521 U.S. at 237 (emphasizing that only this Court has the prerogative of overruling its own decisions, and that lower courts should not conclude that this Court's "more recent cases have, by implication, overruled an earlier precedent"). The Ninth Circuit may, however, have identified factors that legitimately distinguish Title VI from the programs invalidated in *Meek* and *Wolman*, and could be adopted by this Court to modify the holdings of those decisions, even if the Court does not disapprove those cases on their particular facts. See *Walker*, 46 F.3d at 1467 (discussing supplementary nature of Title VI); pp. 29-30, *infra* (discussing point that assistance under Title VI must supplement, and not supplant, resources otherwise available to LEAs and schools).

[13] The possible exception relates to computer equipment, for the Ninth Circuit noted that, at one point, computers lent to San Francisco private schools under Title VI had been "locked" for use only with prescreened software, thus ensuring that they could not be diverted to use with religiously-oriented software. See *Walker*, 46 F.3d at 1464. It does not appear, however, that other instructional equipment lent to religious schools, such as overhead projectors and videocassette players, was similarly "locked" for use only with prescreened materials. See *ibid.*

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To the extent that *Meek* and *Wolman* announce a categorical rule prohibiting loans of instructional equipment and materials to religious schools, those decisions rest on two rationales, both of which are subject to reexamination in light of this Court's subsequent decisions. The first rationale is that, because religious elementary and secondary schools are typically considered pervasively sectarian, any aid to the educational function of such schools must be conclusively held to advance the religious as well as the secular aspects of the education that they provide, which are also deemed to be inextricably intertwined. See *Meek*, 421 U.S. at 364-366; *Wolman*, 433 U.S. at 249-251.

More recently, however, the Court has "departed from the rule * * * that all government aid that directly assists the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. To be sure, the *Agostini* decision, and the decisions on which it relied for the above-quoted statement (*Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986)), involved the distinct situations of instructional assistance provided directly to religious school students by public school personnel, and cash assistance provided directly to students (rather than religious schools) by public authorities. Nonetheless those decisions suggest a more nuanced rule than that announced in *Meek* and *Wolman*, so that loans of instructional equipment and materials to religious schools should not *conclusively* be presumed to advance the religious mission of such schools.[15]

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[15] Indeed, much earlier, in *Regan*, *supra*, the Court upheld a state statute authorizing reimbursement to private schools for the costs of administering state-required standardized tests because

Second, *Meek* and *Wolman* appear to rest also on the rationale that any safeguards adequate to prevent the diversion of instructional equipment and materials to religious purposes would require detailed supervision of religious schools' instruction, resulting in an impermissible entanglement between state and religion. See *Meek*, 421 U.S. at 366-367 n.16 (discussing *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), and lower-court decision in *Meek*). But again, in later cases, including *Agostini*, the Court has indicated that the stringency of its previous rules against interaction of public and religious institutions should be relaxed. *Agostini* observed that "[n]ot all entanglements * * * have the effect of advancing or inhibiting religion," and that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." 521 U.S. at 233 (also citing *Kendrick*, 487 U.S. at 615-617); see also *Aguilar* v. *Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) ("state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute"). The danger of entanglement exists only where "*pervasive* monitoring," see *Agostini*, 521 U.S. at 234, must be employed to prevent public aid from being diverted to religious purposes.

"there was no substantial risk that the examinations could be used for religious educational purposes." 444 U.S. at 656; see *id.* at 659 (noting that the law "provides ample safeguards against excessive or misdirected reimbursement"). The Court explained in *Regan* that *Meek* should not be read to hold "'that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion." *Id.* at 661-662 (quoting *Wolman*, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Thus, the question is not (as the court of appeals believed) whether this Court—having "discard[ed] a premise on which *Meek* relied—i.e., that substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole"—has "replace[d] that assumption with the opposite assumption," namely that aid to religious schools is presumptively permissible. See Pet. App. 70a (internal quotation marks, brackets, and ellipsis omitted). Rather, each case should be assessed on its facts. Direct material aid to religious schools would violate the Establishment Clause if it were so extensive as to supplant resources that the school itself would otherwise provide or obtain, or if that aid were not protected against diversion to religious use by adequate safeguards, or if it favored religious schools over secular schools. In this case, therefore, the court of appeals should have the opportunity to consider whether the statutory limits on the uses to which Title VI aid may be put, together with the actual safeguards put in place by the SEA and the LEA, are in fact adequate to eliminate an unacceptable risk of diversion of resources to sectarian ends. The court of appeals also should have the opportunity to consider the Department of Education's recent Title VI Guidance explaining the kinds of safeguards that should be employed by LEAs administering Title VI programs (see pp. 15-16, *supra*).[16] And the court of appeals should

[16] Accordingly, should the Court conclude that, instead of the categorical rule applied by the court of appeals, a review of the adequacy of safeguards is appropriate, the Court may wish to remand the case to the court of appeals for further consideration, rather than addressing for itself in the first instance the adequacy of the safeguards, on which no findings were made by the court of appeals.

then consider whether such safeguards, if adequate, are in fact so intrusive that they inhibit the ability of religious schools to fulfill their religious mission, or otherwise require "excessive and enduring entanglement." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).[17] But a

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[17] With respect to entanglement, the task of monitoring the use of instructional equipment and materials at religious schools is not likely to require the pervasive kind of surveillance about which the Court expressed concern in *Lemon*. In that case, involving (*inter alia*) state-sponsored salary supplements for religious school teachers, the Court observed that "a teacher cannot be inspected once so as to determine * * * subjective acceptance of the limitations imposed by the First Amendment," and that any effective means to prevent religious school teachers paid by the State from fostering religion would require "comprehensive, discriminating, and continuing state surveillance." 403 U.S. at 619. The same need not be true with regard to monitoring the use of instructional equipment and materials; schools can and do maintain logs documenting the classes in which such equipment and materials are used, the assignments that are carried out on them, and the teachers who use them. Such logs could be required as a condition of acceptance of the equipment and materials, and use of such equipment and materials could also be limited to classes in which the prospect of religious inculcation is relatively minimal. Cf. *Allen*, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.").

One of the statutes examined in *Lemon*—unlike Title VI—also involved reimbursement of funds expended by religious schools. In that context, the Court held that state audits of religious schools' accounts to distinguish religious and secular expenditures would be impermissibly intrusive. See 403 U.S. at 621-622. But even if that particular rationale has survived the Court's subsequent decisions in *Kendrick* (see 487 U.S. at 616-617) and *Agostini* (see 521 U.S. at 233-234), which permit some governmental review of religious institutions' compliance with statutory requirements, the same danger is not present in Title VI. An LEA would not

categorical ban against loans of instructional equipment and materials to religious schools in all cases does not appear necessary to prevent "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Kendrick*, 487 U.S. at 611.

A further important point distinguishes Title VI from the assistance programs invalidated in *Meek* and *Wolman*. Title VI expressly requires that any assistance under that program (whether for private or public schools) supplement, and not supplant, non-federal resources available to the school—reflecting the inherently supplementary role the federal government plays in education. See 20 U.S.C. 7371(b); 34 C.F.R. 299.8(a). Moreover, the aid actually provided under Title VI on a per-student basis is quite small, compared to the other resources available to private schools. See p. 19 n.10, *supra* (appropriation of about $7 per student). The aid provided in *Meek*, by contrast, was described by the Court as "massive" (421 U.S. at 365), and the extent of the aid in *Wolman*, although less clear from the Court's opinion in that case, appears to have been quite substantial as well. See 433 U.S. at 233 ($88 million biennial appropriation for auxiliary aid to nonpublic schools).

In *Meek* and *Wolman*, it was reasonable to conclude that the aid programs "relieved sectarian schools of costs they otherwise would have borne in educating their students." *Zobrest*, 509 U.S. at 12 (so characterizing *Meek*). By contrast, because of the anti-

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have to examine a religious school's books to determine whether equipment was being used for improper purposes; indeed, Title VI proscribes any direct funding or reimbursement to religious schools. The LEA could review the purposes for which loaned equipment and materials had been used by examining the information maintained on logs.

supplantation rule of Title VI and the relatively small amount of money spent per student, it would be difficult to conclude that Title VI effects a "direct subsidy" to religious schools (*ibid.*), or that participation in the Title VI program permits religious schools to divert other resources, which would otherwise be used for secular purposes, to religious use. In addition, because Title VI benefits are offered to all students on a neutral basis without reference to religion, Title VI does not create "a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. Therefore, even if there should be a categorical rule prohibiting loan of instructional equipment and materials in some circumstances, it should be limited to situations where the aid program relieves religious schools of costs that they otherwise would bear, which is not the case under Title VI.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA)

as amended by

IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (IASA)

GUIDANCE

for

Title VI of the ESEA
Innovative Education
Program Strategies

U.S. DEPARTMENT OF EDUCATION
WASHINGTON, D.C.

[Seal Omitted]

February 1999

[iii]

PURPOSE OF THIS GUIDANCE

This document contains guidance for Title VI of the Elementary and Secondary Education Act, as amended by the Improving America's Schools Act. Guidance in this document replaces all prior non-regulatory guidance for Chapter 2 of Title I of the former ESEA—the predecessor program to Title VI. Previous regulations for the former Chapter 2 program are no longer applicable, and no regulations will be issued for Title VI.

This document includes an explanation of statutory requirements contained in Title VI and provides guidance for carrying out programs under Title VI. This document does not impose any requirements beyond those in the Title VI statute and other applicable Federal statutes and regulations, but encourages varying views and focuses upon what can be done, rather than setting limits. State and local recipients that follow the guidance in this document shall be deemed in compliance with Title VI and other applicable Federal statutes and regulations by U.S. Department of Education officials, including the Inspector General.

Throughout the document, we have used several devices to aid the reader in the guidance. Examples are provided in several places and appear in thick-lined boxes. Examples are merely illustrative, and the Department encourages State Education Agencies (SEAs) and local educational agencies (LEAs) to refer to them only as guides that might be helpful in designing and implementing programs under Title VI. Other information that the Department believes will be help-

ful in planning and implementing programs appears in thin-lined boxes.

This document also includes interpretations that are in direct response to questions raised by the Title VI State coordinators. These interpretations appear throughout the document under the hearing "Supplemental Guidance."

For ready reference, an index of "Frequently Asked Questions" is included at the end of this document. These questions are cross-referenced to pages in the guidance answers can be found. Also, the relevant statutory and regulatory citations appear in parentheses following each question.

* * * * *

First, it is critical that private school officials understand and agree to the limitations on the use of any equipment and materials located in the private school. Therefore, LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program, would have been made available for the participating students.

Second, the LEA is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes. The LEA should determine that any Title VI materials, such as library books and computer software, are secular, neutral and nonideological. A good benchmark for this review is that the equipment and materials would be appropriate for use in public schools. The LEA should mark all equipment and materials purchased with Title VI funds so that they are clearly identifiable as Title VI property of the LEA. The LEA also should maintain an up-to-date inventory of all Title VI equipment and materials provided for the benefit of private school students. The Department also believes it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools. The LEA also should perform periodic on-site monitoring of the use of the equipment and materials. The monitoring could include on-the-spot checks of the use of the equipment and materials, discussions with

private school officials, and a review of any logs maintained.

Third, the LEA should designate one public school official to oversee Title VI services for private school students and ensure that services, materials and equipment provided for these students are secular, neutral and nonideological. The designated official also should be responsible for receiving and handling any complaints or allegations that Title VI funds are being used for improper activities for private school students.

Finally, LEAs need to ensure that if any violations occur, they are corrected at once. An LEA must remove materials and equipment from a private school immediately if removal is needed to avoid an unauthorized use.

Supplemental Guidance

Benefit to Students—If Title VI funds are used to provide services for children enrolled in private, nonprofit schools, these services must primarily benefit the children, not the schools. (See section 6402(a)(1), 20 USC 7372(a)(1), which states that an LEA shall provide for services for the benefit of the children in private schools.) A question has arisen as to whether this precludes an LEA from providing reform-oriented Title VI services to private school children because of the likelihood that such services would benefit the private schools, rather than the children. The Department's interpretation is that if the LEA can show that the private school students will receive the primary benefit of reform-oriented Title VI services, the LEA may provide those services for the private school students, even if the private schools also happen to benefit. If the primary benefit of the reform-oriented

Title VI services would fall to the private schools, however, the Department believes that the LEA would not be able to provide reform-oriented Title VI services for the private school children.

FISCAL REQUIREMENTS

Supplement, Not Supplant

Section 6401(b) of Title VI of the ESEA provides that an SEA or an LEA may use and allocate Title VI funds only to supplement and, to the extent practical, increase the level of funds that would, in the absence of funds made available under Title VI, be made available from non-Federal sources. Title VI funds may not be used to supplant funds from non-Federal sources. (20 USC 7371(b))

Whether an SEA or LEA may use Title VI funds as part of any State-mandated program however, depends upon whether non-Federal funds are already available to carry out activities under the State-mandated plan. Section 6401(b) of Title VI prohibits the use of Title VI funds where such use would result in supplanting funds available from non-Federal sources. Presumably, in the absence of Title VI funds, the SEA or LEA would use State funds to carry out a State-mandated plan. To use Title VI funds in connection with the plan would therefore violate the supplement, not supplant requirement of Title VI. However, Title VI funds might be used in connection with the plan, without violating the supplement, not supplant requirement, if the Title VI funds are used for supplemental activities that would not have been provided but for the availability of the Title VI funds.

Example:
A State has a mandated program to test all students in grades one, four, six, nine and twelve. The State decides to use Title VI funds to test students in grades two, five and seven as part of a dropout prevention program. This use of Title VI funds is allowable

In general, an SEA or LEA should determine what educational activities it would support if no Title VI funds were available. If the result of this determination is that no State or local funds remain available to fund certain activities, then the SEA or LEA may be able to use Title VI funds for those activities. In no event, however, may an SEA or LEA decrease State or local funds for particular activities because Title VI funds are available.

Example: An LEA that qualified for State funds has been conducting a program for gifted and talented students. The State funds were based on the number of such children attending schools in the LEA. The number of these children in the LEA decreases and the LEA therefore no longer qualifies for the State funds. The LEA may choose to continue to operate this program using Title VI funds without violating the supplement, not supplant clause. This example presumes that the LEA would not fund the program out of other non-Federal funds in the absence of Title VI.

Maintenance of Effort

SEAs are required to maintain effort in order to receive their full allocation of Title VI funds for any fiscal year. The SEA maintains effort when either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year. (See section 6401(a), 20 USC 7371(a)(1).)

The Department interprets "preceding fiscal year" to mean either the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Both State and local expenditures for free public education within the State are to be considered in determining whether a State has maintained effort under Title VI. The Department interprets "aggregate expenditures for free public education" to include expenditures such as those for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food service and student body activities. States may include in the maintenance of effort calculation expenditures of Federal funds for which no accountability to the Federal government is required. (Impact Aid funds are an example of such funds; however, there is a requirement of accountability for certain Impact Aid funds, such as those received for children with disabilities. Therefore, Impact Aid funds may be included in a State's maintenance of effort calculation under Title VI, but only to the extent that there is no accountability for their expenditure.)

States must be consistent in the manner in which they calculate maintenance of effort from year to year in order to ensure that the annual comparisons are on the same basis (i.e., calculations must consistently, from year to year, either include or exclude expenditures of Federal funds for which accountability to the Federal government is not required). Moreover, States that choose to include expenditures of Federal funds for which accountability to the Federal government is not required, must do so with the understanding that

future years' maintenance of effort calculations may be affected by fluctuating Federal appropriations over which neither the Department, nor a State, has any control.

Finally, it is the Department's position that expenditures not to be considered in determining maintenance of effort under Title VI are expenditures for community services, capital outlay, debt service, or any expenditures of Federal funds for which accountability to the Federal government is required.

Supreme Court, U.S.
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No. 98-1671

IN THE

Supreme Court of the United States

CECIL PICARD, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a general educational aid program which includes separate allocations to participating sectarian elementary and secondary schools and is administered by a local school district so as to permit the recipient sectarian schools to select for their use educational equipment and materials capable of diversion to sectarian or general school administrative uses, as well as library books and other materials prescreened only by title and not content, violates the Establishment Clause especially when those items are placed under the immediate and continuing control of the religious school authorities and are not of a nature generally intended for continuing use by an individual student.

2. Whether administration of a State program allocating specific tax monies for the discretionary selection of fungible school supplies to be used generally by administrative and teaching staff of participating sectarian schools violates the Establishment Clause, particularly when the supplies are not monitored or controlled as to class or other use.

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STATEMENT OF THE CASE

A. The Character And Purpose Of The Institutions Benefitted

In the 1990 Order and Reasons on the cross-motions for summary judgment, Judge Heebe found that of the 46 nonpublic schools participating in the Jefferson Parish Chapter 2 program, 41 are religiously-affiliated and 34 of them are Catholic. Pet. App. at C8.. Seventy-six percent of the nonpublic schools participating in the State Library Materials and School Supplies program under La. Rev. Stat. Ann. §§ 17:351-52 in Jefferson Parish are religiously-affiliated, and those schools receive 89% of the funds allocated under the State program for nonpublic schools. *Id.* Judge Heebe found that the participating Catholic schools require attendance at daily religion classes, conduct sacramental preparation classes, require attendance at Mass, and provide for religious extracurricular activities. *Id.* at C9.

The Archdiocese and the individual schools publish policy statements under which the schools operate. Judge Heebe found that these statements show the pervasive sectarian nature of the schools and that they are institutions in which "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is consistently maintained." *Id.*

One of the responsibilities of a parochial school principal is to be a "Spiritual Leader" who "integrates a religious studies curriculum that incorporates the basic truths and teachings of the Church and a moral education program that challenges students to hold a rational basis for the values they hold; affords an environment for committed teachers to fulfill their

mission as Christians to teach the Gospel; and offers parents opportunities for partnership with the school in the religious education of their children." S.J. Vol. V, Jenkins Dep. Ex. 25 at 13-14 ¶ 1230.03.

The Archdiocese's curriculum objectives state "[t]he distinctive purpose of the Catholic schools is to proclaim the Gospel message, to build community, and to educate. Within the school community the teachers, priests, parents, and students experience together what it means to live a life of prayer, community and personal responsibility and freedom reflective of the Gospel values manifesting peace, brotherhood, love, patience, and respect for others." *Id.* at 38 ¶ 6110.

The court also observed that "virtually every handbook of the Archdiocesan schools reveals the pervasive religious character of the schools." *Id.* at C12. The court then found "that the schools operated under the auspices of the Archdiocese, the majority of the schools receiving Chapter 2 aid, are pervasively sectarian." *Id.*

The record shows the extent to which sectarian teachings are interwoven throughout everyday school life. Howard Jenkins, Superintendent for the Archdiocese's parochial schools, testified Catholic beliefs and doctrines are taught in religion classes, and they are part of the school curriculum. S.J. Vol. V, Jenkins Dep. at 113. But religion is discussed too in secular classes. *Id.* at 112-13. In fact, at Christ the King Parish School teachers are even told that "[c]lassroom decorations need to be religious, educational and decorative." S.J. Vol. V, Jenkins Dep. Ex. 12 at 18.

Alvin Murphy, the President of Archbishop Chapelle, testified:

> Our teachers, whether they are religion teachers or not, are certainly instructed that when issues come up in the classroom that have a religious, moral, or value concept, that their answers be consistent with the teachings of the Catholic Church and that they respond in that way to the students, so that there can be opportunities in other classes other than religion where discussions of religion could take place. . . .

S.J. Vol. V, Murphy Dep. at 27.

Murphy said that at Archbishop Chapelle all students are required to take religion or theology all four years they are there. *Id.* at 15. He testified "[t]he whole focus of it was to teach the children what the teachings of the Catholic Church are and to develop those activities that give those students the opportunity to practice that belief. At Archbishop Chapelle, no child may be excused from the religion or theology classes." *Id.* at 16-17.

In addition to the regular religion classes, the entire student body attends a monthly Mass, and each year students attend a one-day religious retreat. *Id.* at 20. Each class begins with prayer. *Id.* at 21. In each classroom, there is a crucifix and a statue of the blessed mother. *Id.*

The Student and Parent Handbook for St. Christopher School advises that "[i]n conformity with the basic principle of Catholic education, St. Christopher School places religious instruction and religious worship at the center of its program of studies and activities, and strives to develop a total environment which will enable its students to develop as full Christians." S.J. Vol. V, Jenkins Dep. Ex. 9 at 1. Similarly, Christ the King's Handbook advises that "[m]oral and spiritual training is an integral part of all educational classes at our

school." S.J. Vol. V, Jenkins Dep. Ex. 10. Our Lady of Perpetual Help School states one of its objectives is "[t]o teach specifically Catholic principles and Christian values." S.J. Vol. V, Jenkins Dep. Ex. 11. St. Cletus School advises "that the scope of its teaching and the effort to integrate all learning with faith distinguish the Catholic school from other forms of the Church's educational ministry to youth and give it special impact. S.J. Vol. V, Jenkins Dep. Ex. 17.

At our Lady of Prompt Succor School, the Handbook states that "[i]n addition to strong classroom emphasis on the Catholic Faith, our children are required to attend Holy Mass weekly. Also opportunities are given, on a regular basis, for our children to receive the Sacrament of Penance." In addition, parents and students are advised that "[a]part from their Student Masses, it is required that our Catholic children worship at Mass every Sunday." S.J. Vol. V, Jenkins Dep. Ex. 18.

St. Mary Magadalen School's Parent-Student Handbook states:

> The primary goal of the curriculum in the Catholic Schools in the Archdiocese is to provide those learning experiences most conducive to inculcating in students virtues, knowledge, understanding, and skills necessary for the student's spiritual, intellectual, social, cultural and physical development, in keeping with the stated philosophy of our school.

S.J. Vol. V, Jenkins Dep. Ex. 3. at 17. The school describes the "aim and purpose of St. Mary Magadalen School [is] . . . to create and provide experiences for the students, to proclaim the Gospel message, to worship and pray together, to know what it means to live and serve interdependently, to

build family and community in society, to be educated fully in order to be successful in the present and future society, shaping the world by their Christian Visions and Values." S.J. Vol. V, Jenkins Dep. Ex. 3a.

The Teacher's Handbook for St. Mary Magadalen admonishes that "[t]eachers should instruct the students in the content of their subject matter as well as in faith, morals, and the development of good Christian values." S.J. Vol. V, Jenkins Dep. Ex. 35 at 7.

St. Benilde School's Policy Handbook states:

> The integration of Christian truths and values within the framework of the learning experiences characterizes the educational approach of St. Benilde. In all its curricular endeavors, St. Benilde School strives to provide educational opportunities that will enhance the continued growth and development of its students. Religion is considered the most important subject in the curriculum and is taught on a daily basis.

S.J. Vol. V, Jenkins Dep. Ex. 4 at 5.

The district court also found that at least some schools exercise a religious preference in accepting students and in charging tuition. Further, the Archdiocese's official policy calls for a religious preference in teacher hiring. The contracts for principals and teachers in archdiocesan schools allow termination for observing a lifestyle contrary to church teachings. *Id.* at C8-C9.

The Handbook of Policies for St. Clement of Rome School restricts admissions and advises:

1. Parents are required to be members of St. Clement of Rome Parish.

2. Parents must strive to live out their faith commitments by joining along with their children in the regular Sunday worship of their faith.

3. They must show allegiance to St. Clement of Rome Parish by participation in the organization of the Parish.

4. They agree to cooperate with school authorities in disciplinary matters dealing with their child (children).

5. They conscientiously practice stewardship.

S.J. Vol. V, Jenkins Dep. Ex. 5 at 2.

Thus, Judge Heebe concluded that "instruction in religious truth and values is an integral part of the school program. *It is not one more subject alongside the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.*" Pet. App. at C10.

The Catholic schools discriminate in hiring. The Archdiocese policies on parochial school principal qualifications include the requirement that the individual:

Be a Catholic for whom loyalty to Christ, His people, and the Church are of first importance and hold a philosophy of education consistent with this Catholic conviction. [*Id.* at 12 ¶ 1230.01].

Teachers employed in the **Archdiocesan** schools should preferably be Catholics who have a knowledge of and

> commitment to the Catholic faith and to Christian living. In hiring non-Catholics, care should be taken that they also have a knowledge of the Catholic faith and a commitment to Christian living. [*Id.* at 17 ¶ 2110.01].

Our Lady of Divine Providence School Handbook states that Christian educators at its school are "[t]o create an environment of Christian living in all areas of school life where the 'Witness of Jesus' is proclaimed through values lived and taught in the school to the students who will become the adults of the future." S.J. Vol. V, Jenkins Dep. Ex. 6 at 3. Further, the handbooks states that the school "is a Catholic School in every aspect of its program, therefore, children of other faiths may wish to attend. However, it must be fully understood that they must participate and receive grades in the study of Catholic Doctrine." Its faculty handbook requires a prayer table in each classroom upon which "either the Old and New Testament displayed, along with only other religious articles deemed appropriate." Further, "[i]t is the responsibility of the religion teachers to see that these tables are erected and secure the articles for display." S.J. Vol. V, Jenkins Dep. Ex. 32 at ¶ 41. Further, at that school, each teacher is to attend his or her grade level family Mass. *Id.* at ¶ 51.

St. Benilde School Teacher's Handbook quotes from "To Teach as Jesus Did," stating:

> Integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but more importantly by the presence of dedicated teachers who approach an integrated approach to learning and living in their private and professional lives.

S.J. Vol. V, Jenkins Dep. Ex. at 10.

The parochial school is also an integral part of the church itself. The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans states:

> The Pastor is the **spiritual** and **temporal shepherd** of the **parish**. . . . A portion of this responsibility is carried out through the parochial school. . . .
>
> Since financing the school is a major responsibility, the **pastor** must assume a significant role in the development of the total parish budget. Therefore, he must make a determination of the amount of subsidy that can be allocated to the **parish school**.

S.J. Vol. V, Jenkins Dep. Ex. 25 at 10 ¶ 1210. Thus, school expenditures have a direct effect on the parish church.

B. The Nature Of The Aid Provided Under Chapter 2

Chapter 2 is provided to schools, not individual students. It is the nonpublic school that decides whether to participate in Chapter 2, and if the school opts not to participate their students receive no Chapter 2 benefits. S.J. Vol. II, Woodward Dep. at 41-42. The school decides in which program under Chapter 2 it wish to participate, and it need not be the same program as the public school. *Id.* at 28-29.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement 9 "innovative assistance programs." 20 U.S.C. §§ 7311(b); 7312(a)(c)(1); 7351. *See also* Pet. App. A47.

Daniel Lewis, the head of the Chapter 2 program in Louisiana, testified about the reauthorization of Chapter 2. He said although computer hardware could be selected by a nonpublic school as part of its allocation without being tied to a specific need, S.J. Vol. II, Lewis Dep. at 17 and 18, other instructional equipment, such as overhead projectors, may still be purchased under Chapter 2 as long as the nonpublic school demonstrates a need for the equipment. *Id.* at 22-24, 28.

Not all nonpublic schools eligible to participate in the Chapter 2 program do so. In fact, nonpublic schools may elect *not* to participate. Lewis Dep. at 80. Lewis indicated that the Episcopal High School in Baton Rouge has elected not to participate because they had enough money without participating in the program, *id.* at 81, and they did not want to have the "feds necessarily looking over their shoulder on what they're doing." *Id.* at 82. Students who attend a non-participating nonpublic school receive no Chapter 2 benefits. *Id.* at 84-85. Each year, an allocation of Chapter 2 funds is made for each participating nonpublic school on a per capita basis by the number of children. *Id.* at 86-87.

As Chapter 2 is administered in Jefferson Parish, the nonpublic school determines what items it would like to purchase consistent with its allocation, and "[t]he only time [the] local school districts have rejection rights over a non-public school's wish or a non-public school's use of the dollars, is if it's in violation with the law." *Id.* at 89-90.

The State has no requirements as to the selection of the various items by the nonpublic schools since that is left up to the LEAs to decide with the nonpublic school authorities. *Id.* at 96. An LEA is not limited in the type of material that a nonpublic school may elect. *Id.* at 97.

C. Insufficiency Of Any State Chapter 2 Safeguards

The State encourages, but does not require, LEAs to obtain assurances from nonpublic schools that they will not use the Chapter 2 items supplied for sectarian purposes. S.J. Vol. I, Lewis Dep. at 102-03. Thereafter, both the State and LEA conduct infrequent and announced monitoring visits. *Id.* at 103. Lewis testified that each year he normally visited only one or two nonpublic schools within each school district. *Id.* at 104.

The State requires LEAs to make monitoring visits at least once a year. *Id.* at 105. But the State receives no reports concerning those monitoring visits. *Id.* at 105-06. When the State reviews the LEA's monitoring process, it only ascertains the LEAs have a schedule and check the criteria used. *Id.* at 152.

Lewis testified he would not expect an LEA to be able to determine on a monitoring visit whether educational equipment had been used for sectarian purposes. *Id.* at 106. Although Lewis said he advised LEAs to check whether items furnished were secular, neutral, and nonideological, he indicated it would be impossible to know by examining the equipment. He also said it would be as difficult to make the same determination of reference books because "you can't always judge a book by its cover." A title might sound sectarian and might not be. On the other hand, a book might sound secular and be very religious. *Id.* at 134.

Lewis agreed only *unannounced* visits would be helpful. *Id.* at 133. But no unannounced visits are made at either the State level in Louisiana or the local level in Jefferson Parish.

Lewis confirmed that books purchased under Chapter 2 in

Louisiana are *not* selected from some approved list circulated by the State. *Id.* at 136. And, in fact, nonpublic schools are *not* even furnished catalogs with suggestions as to books to be ordered. *Id.* at 136-37. When Lewis visited the one or two nonpublic schools within a school district on the State's monitoring visit, although he looked at books purchased under Chapter 2, he only spent about 5 to 10 minutes doing so. *Id.* at 138.

Further, the State does nothing to ascertain if the materials, equipment, books, or whatever else is purchased with Chapter 2 funds and supplied to nonpublic schools have reduced the amount of money the nonpublic schools have budgeted for library and educational equipment. *Id.* at 145-46.

In March of 1985, the State wrote the U.S. Department of Education in response to an on-site assessment by the federal government of Louisiana's administration of Chapter 2 block grants saying it would increase the number of annual visits of the LEAs from one-third to one-half. The State attempted to do this but then had to revert back to the three year monitoring cycle due to lack of manpower. *Id.* at 146-47.

Lewis testified that an assurance given by a nonpublic school is only a statement of good intent and that the State does not attempt to enforce such assurances. *Id.* at 180.

The last guidelines issued by the State, which is part of this record (*see* S.J. Vol. II, Lewis Ex. 28 at 18), showed the monitoring process the State follows concerning Chapter 2 is loose and infrequent:

> If the Chapter 2 program includes projects that would best be viewed at a school site, a visit to a school should be arranged, or school personnel could be called to the

meeting location. If there are eligible nonpublic schools participating, a visit to one of them is requested. Any visit should be made to those schools in close proximity to the location of the meeting. *Id.* at 18. According to the guidance, it was recommended that the on-site meeting be held where Chapter 2 records were located and unless there were serious areas of concern, "the Bureau of Consolidated Education Programs will monitor current Chapter 2 programs every third year."

Id.; S.J. Vol. II, Lewis Dep. at 39-41.

The new guidance provided for a new monitoring form which included the question: "Are the services, materials, equipment, or other benefits provided to nonpublic schools secular, neutral and non-ideological?" However, Lewis acknowledged there was no way through monitoring one could determine whether educational equipment, such as computers, has been diverted for sectarian use. S.J. Vol. II, Lewis Dep. at 44-45; *see also* Lewis Dep. Ex. 28 at 22 ¶ 11.

D. Insufficiency Of Jefferson Parish's Chapter 2 Safeguards

Ruth Woodward, the Chapter 2 coordinator for Jefferson Parish, testified she was "responsible for distribution of funds to those schools for the purpose of instructional materials, equipment and supplies." S.J. Vol. II, Woodward Dep. at 17. She testified nonpublic schools selected the materials to be ordered. *Id.* at 33. Projects for which Chapter 2 items are purchased are determined once every three years by the nonpublic schools. *Id.* at 132-33.

After Jefferson Parish receives the Chapter 2 allocation from the State, Woodward notifies each nonpublic school of

the allocation provided for their school. The nonpublic school then checks off an equipment list furnished by Woodward what equipment they want, and the nonpublic school then orders those items from the book jobbers or from suggested vendors. *Id.* at 131.

Once the orders are received, requisitions are attached and forwarded to the school district purchasing department. When the orders are received by the school district's warehouse, they are merely checked against the requisition, labeled, and distributed to the schools. *Id.* at 137. In fact, the items are sometimes shipped by the vendor directly to the school. *Id.* at 138.

Although it is claimed that the Chapter 2 equipment and materials are "loaned" by the public school district to the nonpublic schools, the public school district provides no maintenance or repair. The public school system views this as the nonpublic school's responsibility. *Id.* at 139-40. And once the items were turned over to the schools, the school district never received any of the items back with the exception of the 191 books found to be sectarian. *Id.* at 142.

Woodward testified there was no predetermined approved list supplied to nonpublic schools from which to select library and media materials. Selections are made by nonpublic school personnel by looking at their own catalogs. *Id.* at 37. When ordering books for nonpublic schools, Woodward only looks at the book title. *Id.* at 67-68. She confirmed that nothing in the selection process would cause her to look at anything else. *Id.* at 68. This title review is the only screening done by the school district even though in 1985 191 books deemed to be sectarian were ordered by assorted nonpublic schools using Chapter 2 funds. *Id.* at 74-75. This title review is conducted by Woodward and her staff. *Id.* at 78-79. And the only

instruction Woodward gives to her clerical staff is that if by looking at the title they think there is anything other than secular content, they should notify her. *Id.* at 79. Woodward has never gone beyond looking at the titles to ascertain the content of a book, nor has anyone else in the school district. *Id.* at 83-84. She was the final authority as to whether a Chapter 2 book selected by a nonpublic school should be ordered. *Id.* at 89.

Since May 1, 1985, Woodward has seen book titles she thought might not be secular. But when this occurred, she just crossed out the selection without further inquiry. *Id.* at 90. This suggests that even though assurances have been provided and nonpublic school personnel have been advised that sectarian books may not be selected, the nonpublic schools continue to order sectarian material.

Computers furnished to nonpublic schools by the school district may be used for a variety of purposes, including the printing of church bulletins. *Id.* at 148. Woodward testified she does nothing to monitor computer use. *Id.* at 149.

Woodward, like Lewis, acknowledged there was no way she could know whether educational equipment was used to teach religion. *Id.* at 92. She goes on-site to monitor each of the nonpublic schools once a year, spending only from 45 minutes to 2 hours at each visit. *Id.* at 96-97. Her visits are pre-announced, and her letter indicates what items should be available for her viewing. *Id.* at 97. Usually the principal meets with her and the school's Chapter 2 contact person, usually the librarian. *Id.* Woodward then makes a random check of materials and equipment that have been purchased with Chapter 2 funds. *Id.* at 97. In doing this, she checks to ascertain if the items have been appropriately labeled and that recordation of their use has been attempted. For example, in

the case of a library book, she checks to see how many people are in fact using it. *Id.* at 98. She also determines if use of equipment was recorded but provides no forms for the school to use. *Id.* at 98. But Woodward admitted there would be no way to know from her on-site visits whether material or equipment are used for proper purposes. *Id.* at 100-01.

In her monitoring visits, Woodward never inquires about the content of the class which has used the educational equipment. For instance, if the equipment was used in a science class, she does not ask whether science is taught according to the creation concept. *Id.* at 117. And in her orientation sessions, there is no discussion concerning what might be sectarian and what might be secular. *Id.* at 118. Woodward never makes *unscheduled* on-site monitoring visits and normally advises of her monitoring visits one month in advance. *Id.* at 120.

Although there are people who use the materials and equipment in addition to the Chapter 2 contact persons, Jefferson Parish has devised no process to ensure that these people have been informed that the materials and equipment are to be used only for secular, neutral, and nonideological purposes. *Id.* at 126-27. Also, Woodward does not require the items furnished be secured against unauthorized use. *Id.* at 123-24. Further, she can't ascertain if equipment was used for sectarian purposes. *Id.* at 127-28.

The only request for the purchase of instructional equipment that has ever been turned down while Woodward was the coordinator was wiring for St. Martin School. Although she had judged it not to be a violation "because the wiring . . . could be removed from the facility," this was subsequently rejected by the State. *Id.* at 135-36. In fact, she has never rejected any equipment request. *Id.* at 136.

Woodward understands the "supplement and not supplant" requirement as prohibiting the *replacement* of equipment, materials, or supplies that had been originally purchased with either local or State money. For example, there would be a supplanting if a new typewriter was purchased to replace one which had originally been purchased with State funds. She understood the requirement is not violated if it is demonstrated that it is for a new program. *Id.* at 152-56.

Woodward also understands Chapter 2 allocations may be used by nonpublic schools to purchase educational equipment to provide in-service programs to train faculty and staff at nonpublic schools. *Id.* at 164-66.

E. Louisiana Library Book And School Supply Program

Under the Louisiana Library Book and School Supply program, La. Rev. Stat. Ann. §§ 17:351-54, schools are given an allotment with which to order various supplies, as well as library books. The available supplies include pencils, construction paper, newsprint, copy paper, and similar items. Cannon Dep. Ex. 7. Also available through the State are software, film strips, and similar items. Cannon Dep. Ex. 9; Kropog Dep. Ex. 5; Junkin Dep. at 131-33.

Marie Cannon, the Principal at St. Anthony's School, testified about purchases that were made for school supplies. Cannon Dep. at 91-109; Cannon Dep. Ex. 7. The order forms indicated large purchases of number 4 bond copier paper. When Cannon was asked about the ordering of 451 reams of copier paper at a total cost of $915.53, *id.* at 96, she testified it was for general classroom use. *Id.* at 97. It was located in a storage room for common use by all including religion teachers. *Id.* at 108-09. There is absolutely no monitoring of this program by the school district or the State. *Id.* at 108-09.

REASONS THE WRIT SHOULD BE DENIED

1. Petitioners argue that *Agostini* expressly rejects the general proposition that "government aid that directly aids the educational functions of religious schools is invalid." But what this Court actually stated is it has "*departed* from the rule relied on in [*Grand Rapids Sch. Dist. v.] Ball*, [473 U.S. 373 (1985)] that all government aid that directly aids the educational functions of religious schools is invalid." *Agostini*, 117 S. Ct. 2011 (emphasis supplied).

This Court did not say that the general proposition has been rejected. In fact, the Court stated that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar [v. Felton*], 473 U.S. 402 (1985), was decided." The exception to the general rule is when the aid flows to the school, not as a result of specific governmental (state) direction but instead as a result of private decision-making. *Id.* at 2011-12.

But here the aid flows directly to the sectarian schools in Jefferson Parish as a result of joint government and sectarian school decision-making. In fact, the Secretary of Education in his brief noted that this is "a federal program that provides financial assistance to Local Educational Agencies (LEAs) for education-improvement programs, and authorizes LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to private elementary and secondary schools, including religious schools . . . ." Brf. of Sec'y at 1. The Jefferson Parish Public School System ("JPPSS") has provided the nonpublic schools with practically unfettered discretion as to how their share of the Chapter 2 allocation will be spent. In essence, JPPSS has issued to the

participating sectarian schools what amounts to a credit card for use of up to the full extent of their Chapter 2 allocation.

Neither the parent nor the student decides: (1) whether the school will participate; (2) the nature of the project -- that is which students and/or teachers will be targeted by the program; and (3) exactly what items will be provided. Further, in Jefferson Parish, the items purchased and provided to the sectarian schools remain for the school's use long after a given student leaves, whether during the school year or after completion of the student's enrollment. At all times the items provided are under the *immediate control*, not of the student or the LEA, but of the sectarian school authorities.[1] If the no direct aid principle is no longer of constitutional significance, there was no reason for the *Agostini* Court to note that:

> While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools . . . ." In fact, they are not. . . . Title I funds are instead distributed to a *public agency* (an LEA) *that* dispenses *services directly to the eligible students within its boundaries, no matter where they choose to attend school.*

117 S. Ct. at 2013 (first emphasis in original; second emphasis supplied).

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[1]The Secretary of Education, in his brief, acknowledged that "the *Agostini* decision, and the decisions on which it relied . . . involved the distinct situations of instructional assistance provided directly to religious school students by public school personnel, and cash assistance provided directly to students (rather than religious schools) by public authorities." Brf. of Sec'y at 25.

2. Petitioners claim that the court of appeals improperly focused on the character of the State aid to parochial schools rather than on the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, as modified by *Agostini*. Pet. at 10. But, in *Agostini*, 117 S. Ct. at 2015, this Court stated:

> Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." [*Lemon*, 403 U.S.] at 615.

The *Agostini* Court said it still continues to explore whether the aid has the "effect" of advancing or inhibiting religion. 117 S. Ct. at 2010. But the Court maintained the criteria used to assess whether aid to religion has an impermissible effect has changed somewhat. It has such an effect if there is *State inculcation* of religious beliefs; however State inculcation is no longer presumed by the mere placement of public employees on parochial school premises. *Id.* Also, State inculcation is deemed not to have occurred when the aid is distributed directly to the student, and the aid (such as a college vocational tuition grant or the employing of a sign-language interpreter to be used in the classroom) may be used at any school chosen by the recipient student. *Id.* at 2011.

It is true that in *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), this Court permitted direct reimbursement to sectarian schools for administering State prepared and State required recordkeeping. But since "[the] nonpublic school does not control the content of the test

or its result," the arrangement "avoid[s] the kind of direct aid forbidden by the Court's prior cases. *Id.* at 656. *Regan* explained that "if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education." *Id.* at 657. The fact that the State had effective control over the testing process by the use of standardized tests with the grading also being under the control of the State, *id.* at 655-56, was thought to eliminate any possible use of the testing and scoring process for the school's religious mission.

Clearly, the court of appeals in this case used the appropriate constitutional analysis by focusing on the character of the State aid, and its analysis is perfectly consistent with the *Lemon* test as modified by *Agostini*.

The Secretary of Education's brief at page 12 acknowledges that the court of appeals not only relied on *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), but also on *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), in concluding that "the 'boundary lines' between permissible and impermissible assistance" was dependent on the character of the aid. In *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995), the court concluded the decision in *Regan* had undermined *Meek* and *Wolman*. Judge Livaudais' ruling on summary judgment issued on January 28, 1997, embraced the

Walker analysis of *Regan*. Pet. App. at B30.[2]

What is significant about *Regan* is there this Court relied heavily on Justice Powell's concurring opinion in *Wolman*. *Regan*, 444 U.S. at 661-62. In fact, Justice Powell's concurring opinion has lighted the way for a practical and logical analysis of where the line should be drawn in this area of Establishment Clause jurisprudence. His concurring opinion was, in fact, aimed at explaining his agreement with the furnishing of textbooks to students validated in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), as well as his agreement with the Court invalidating the loaning of instructional materials and equipment in *Meek*. In a few brief words, he has encapsulated the constitutional analysis implicit in the long line of Establishment Clause decisions dealing with the issue present here.

Justice Powell observed that "the Court [in *Meek*] reaffirmed *Allen*, thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible -- *so long as the aid is incapable of diversion to religious uses, . . . and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions.*" *Wolman*, 433 U.S. at 263 (emphasis supplied). Thus, whether the grant or loan of educational equipment and materials are either divertable to religious purposes *or* provided directly to the pervasively sectarian school is the key.

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[2]It is significant that the brief of the Secretary of Education clearly seeks to distance itself from the *Walker* decision when it states: "We do not suggest that the Ninth Circuit properly concluded that it was not bound by *Meek* and *Wolman*." Brf. of Sec'y at 22 n.12.

Justice Powell's reasoning and knowledgeable view of the educational process is in sharp contrast to the suggestion of the Secretary of Education that this matter should be remanded to determine divertability of the items provided and effectiveness of safeguards in place. It also absolutely rejects petitioners' analysis. Justice Powell observed in *Wolman*:

> Here the statute is expressly limited to materials incapable of diversion. Therefore, the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request" citing *Allen*, 392 U.S. at 244 n.6.

Id. at 263 (emphasis in original).

Justice Powell also distinguished between actual loans to students (such as textbooks in *Allen)* and "loans" to students of items like overhead projectors which are a "transparent fiction," a ruse for furnishing aid directly to the sectarian schools. And he found permissible only the "lending to the individuals themselves [of] only appropriate instructional materials and equipment similar to that customarily used in public schools." *Id.* at 263-64. This reasoning is in accord with the court of appeals decision here.

4. Petitioners argue that in this case no funds reach the coffers of participating religious schools. But whether the benefits provided are in the form of cash or in kind is not constitutionally relevant. In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993), this Court quoting from *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1986), stated:

> [T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is

"that of a direct subsidy to the religious school" from the State.

See also Wolman, 433 U.S. at 251. Likewise, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), an indirect aid case involving the furnishing of textbooks to students, the Court observed that "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." From a practical standpoint, the sectarian schools in Jefferson Parish were provided the equivalent of money -- that is credit to buy the items they wanted up to the extent of their allocation.

5. Petitioners contend that neither the respondents nor the Fifth Circuit cite any instance of diversion of Chapter 2 equipment or materials to religious use. But obviously the purchase of 191 books furnished to various sectarian schools belies this assertion. *See also infra* at 13; S.J. Vol. II, Woodward Dep. Ex. 21; and Pet. App. at B13. In fact, the brief of the Secretary of Education noted there had been "occasional lapses from Title VI's requirement of secularity." Brf. of Sec'y at 9 n.4.

6. Petitioners contend "the constitutionality of Chapter Two and the State's Library Book and School Supply statute depend upon the second and third [effect] and [entanglement] prongs of the *Lemon* test, as modified by *Agostini*." Pet. at 9. But they fail to discuss why the Chapter 2 and State programs do not bring into play the "excessive entanglement" concern expressed in this Court's Establishment Clause jurisprudence.

Significantly, the Secretary of Education's brief at 27-28 does recognize that employing sufficient safeguards to ensure the items furnished to sectarian schools must not be so intrusive that "they inhibit the ability of religious schools to

fulfill their religious mission, or otherwise require 'excessive and enduring entanglement.'" But sufficient safeguards, with regard to improper use of furnished items, would result in excessive entanglement. And no remand is necessary to reach that conclusion.

In *Marburger v. Public Funds for Public Schools*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974), the Court dealt with a program, like here, that required the items supplied to be used only for "secular, neutral, and nonideological purposes." But the *Marburger* court stated:

> Although it is obvious that "supplies," "instructional materials," and "equipment" are inherently neutral, the uses to which they can be put are clearly varied. Most of these items obviously can be used with equal facility in the teaching of religious studies, as well as they can be used for the teaching of secular-nonideological subjects.

Id. at 38-39.

Agostini does not undermine this constitutionally required diversion concern expressed by the Secretary of Education. It is true that *Agostini* concluded there was no excessive entanglement problem in New York's Title I program. But it reached such a conclusion after finding that the factors necessary to determine excessive entanglement required a focusing on the character and purpose of the institution, the nature of the aid, and the resulting relationship between the government and religious authority.

In this case, we do not merely presume that the recipient sectarian schools in Jefferson Parish are pervasively sectarian. Rather, the Court made a specific finding that "the majority of the schools receiving Chapter 2 aid, are pervasively

sectarian." Pet. App. at C12. The court also held that "[a]t least some of the school's exercise religious preference in accepting students." *Id.* at C8. And "[t]he official policy of the Archdiocese calls for a religious preference in the hiring of teachers." *Id.* at C9. Of major importance also is the court's finding that the atmosphere of the participating Catholic schools "is dedicated to the advancement of religious belief." And the record as well establishes that in these schools religious teachings and values are not compartmentalized in the religion class. Rather, they are in the eyes of the parochial school authorities appropriate topics for discussion in what might normally be viewed as a secular class. *See infra* at 2-6. Thus, checking once a year or even once a month the usage "logs," as suggested by the Secretary, would not be adequate to determine whether the items had been used to advance religious teachings and values. Further, because sectarian values so completely permeate the instructional and extracurricular aspects, as well as the very purpose, of the institution, any usage whatsoever necessarily advances the religious mission of the sponsoring church.

The reasoning of this Court in *Lemon*, 403 U.S at 618-19, on this question is as sound today as it was in 1971, when this Court stated:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

> Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between the teacher and religious authorities over the meaning of the statutory restrictions.

Justice Brennan, in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987), cogently noted that "[w]hat makes the application of a religious-secular distinction difficult is that the character of the activity is not self evident." Inquiry would be required into teachings and discussions of the "secular" classes in sectarian schools such as those participating in Jefferson Parish's Chapter 2 program. As *Lemon*, 403 U.S. at 635, noted, "[n]o matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class."

Even the prospect of adequate monitoring, even if not conducted within each classroom regularly on an ongoing day-to-day basis itself raises yet another major constitutional problem as expressed by Justice Brennan in *Amos* that

> this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would

be shaped in part by the prospects of litigation.[3]

Id. at 343.

It was no doubt such a concern that caused the *Marburger* court, and subsequently this Court on affirmance, to conclude that the providing of educational equipment, books, and materials (such as those provided under Chapter 2 and supplies furnished under the State program) must be prohibited regardless of the so-called safeguards. 358 F. Supp. at 38-39. *Agostini* is not to the contrary. No such dilemma existed there. The New York Title I program was designed and fully administered by public school employees in classrooms dedicated to Title I with the equipment and materials being secured for only Title I use. *Agostini*'s program fully compartmentalized the secular teaching from any sectarian involvement. Thus, any monitoring could not result in excessive entanglement. As Justice O'Connor explained in her dissent in *Aguilar v. Felton*, 473 U.S. 402, 427 (1985), "[i]t is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school."

Further, the compartmentalized Title I program in New York where the public school authorities (1) maintain sole responsibility for selecting students; (2) administer their own tests for determining eligibility; and (3) do not engage in religious activities of the sectarian schools or introduce any religious matter into their teaching can in no way be deemed

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[3] "A case-by-case analysis for all activities therefore would both produced excessive government entanglement with religion and create the danger of chilling religious activities." *Id.* at 343-44.

to be "sectarian." As this Court stated, the "degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Hunt v. McNair*, 413 U.S. 734, 746 (1973), citing *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Thus, what this Court said concerning excessive entanglement in an *Agostini*-type program has absolutely no relevance to the Chapter 2 program here as administered in Jefferson Parish.

7. Only the State petitioners seek a writ of certiorari on the State Library Book and School Supplies statute, La. Rev. Stat. Ann. §§ 17:351-352, but set forth no specific reasons why this Court should review the court of appeals decision concerning that program. That program provides no monitoring at all and even fungible items, including large quantities of xerox paper, have been used generally and made available to teachers of religion classes. *See infra* at 16.

There is no split in the circuits on this program. No circuit nor any district court has concluded it is constitutionally permissible to provide fungible items to sectarian schools, particularly when the program has been carried out without providing any monitoring or obtaining assurances. This is particularly true where, as here, the record indicates such items have been used by all teachers, including those who teach religion. Regardless of what this Court may do with regard to the Chapter 2 question, no review is called for as to the State program.

8. The Secretary of Education apparently seeks to have this Court "consider the Department of Education's recent post-judgment Title VI Guidance." Brf. of Sec'y at 27. Clearly, such an adventure would call upon this Court to render an advisory opinion which it is prohibited from doing. This case

is ill-suited to be used as a vehicle to determine the extent of safeguards which the Department of Education has waited for more than 15 years, and after the judgment of the court of appeals below, before providing such guidance.

This case was filed in 1985 -- 15 years ago. At each stage, respondents contended that the Jefferson Parish program was defective because divertable items were provided and the program also provided direct aid to pervasively sectarian institutions. In 1990 Judge Heebe ruled on cross-motions for summary judgment that Chapter 2 was unconstitutional as administered in Jefferson Parish. He not only relied upon *Meek* and *Wolman*, but also on the diverability holding of *Marburger*. Pet. App. C13-15.

One of the defects in Judge Livaudais' 1997 Order and Reasons vacating Judge Heebe's earlier summary judgment decision was in ignoring the fact that respondents claimed the items were divertable with resultant excessive entanglement if the program was sufficiently monitored. *See* Pet. App. at B23 where Judge Livaudais acknowledged that respondents raised this issue.

Any remand would ultimately require a hearing on the merits by the trial court concerning issues of fact on the questions of "divertability" and "safeguards" unless the court of appeals, after combing the record, concluded that defendants had not disputed those factual questions.

It has been said that justice delayed is justice denied. It has been 15 years since respondents filed this action. It took 4 years for the district court to render its post-trial opinion on issues remaining after originally holding that respondents were entitled to summary judgment on the Chapter 2 issue. Thereafter, it took the district court more than 2 years to

decide the post-trial motions. This case should come to a speedy conclusion.

CONCLUSION

For all the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated: May 17, 1999

Respectfully submitted,

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Nos. 98-1648 and 98-1671

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

1. Respondents maintain (Br. in Opp. 6, 15)* that the decision of the Fifth Circuit in this case, striking down the application of Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 7301-

* "Br. in Opp." refers to the brief in opposition to the petition for a writ of certiorari in No. 98-1648.

7373, in Jefferson Parish, Louisiana, does not conflict with the Ninth Circuit's decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld the application of Title VI in San Francisco. They assert that the two programs are distinguishable on their facts in constitutionally significant ways. Both lower courts in this case, however, found the two programs to be indistinguishable. See 98-1648 Pet. App. 59a, 107a.

Indeed, although respondents suggest (Br. in Opp. 15) that the San Francisco Title VI program upheld in *Walker* was confined to prescreened materials and locked computer hardware and software, in fact private schools in San Francisco received "library books, textbooks, videos, overhead projectors, movie and slide projectors and projection stands, television sets, record players, cassette recorders, VCRs, video cameras, 'listening centers,' globes and maps, microscopes and other lab equipment, computer equipment, musical equipment, stereo systems, and desks and tables." 46 F.3d at 1464. Although not all of these materials were lent to private schools in every year, and the program was eventually limited to prescreened library books, instructional materials, and reference materials, see *ibid.*, the Ninth Circuit's decision upholding the program was not limited to the latter, more restricted class of materials. See *id.* at 1469 n.17 (upholding loan of maps and science kits, and finding them indistinguishable from textbooks, which may be lent to students under *Board of Education* v. *Allen*, 392 U.S. 236 (1968)).

2. Respondents argue (Br. in Opp. 18) that the anti-supplantation rule of Title VI, see 20 U.S.C. 7371(b), requiring that funds made available under the federal program supplement, and not supplant, other re-

sources, applies only to the local educational agency (LEA) that receives the federal funds, and not to private schools that are lent equipment purchased with Title VI funds by the LEA. The statute, however, is framed generally to prohibit the use of Title VI funds by LEAs that would supplant non-federal resources in any way. Title VI requires LEAs to use and allocate Title VI funds "only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this part, be made available from non-Federal sources, and in no case * * * to supplant funds from non-Federal sources." *Ibid.* The statute's prohibition against the use of federal funds to supplant "non-Federal sources" is not limited to the supplantation of state and local governmental sources of funds, as opposed to non-governmental sources of funds. If an LEA used Title VI funds to provide private schools with equipment that would, in the absence of federal funds, be made available from any non-federal sources, including private sources, the anti-supplantation rule would be violated.

Further, the Department of Education's regulations implementing the ESEA's provisions governing the participation of private schoolchildren in federal programs expressly require that LEAs use Title VI funds "to provide services that supplement, and in no case supplant, the level of services that would, in the absence of services provided under [Title VI], be available to participating children * * * in private schools." 34 C.F.R. 299.8(a). That regulation is not limited to prohibiting supplantation of services that would be available to private school children from other *public* sources, but also prohibits use of Title VI resources to supplant services that would be otherwise

made available from private resources. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 210 (1997) (similar regulation implementing Title I of the ESEA prohibits supplanting "services already provided by the private school"). Finally, the State of Louisiana has also applied Title VI's anti-supplantation requirement to prohibit supplantation of nonfederal resources by private schools; in its Title VI Guidelines to LEAs, the State recommended that LEAs require private schools to give assurances, in their applications for participation in the Title VI program, that resources made available under Title VI will be used only to supplement, and in no case supplant, funds available from non-federal sources. See Exh. D-4, at 85, to Gov't Opp. to Resp. Mot. for Summ. Judg.

3. Respondents suggest (Br. in Opp. 28) that, notwithstanding the court of appeals' decision invalidating the loan of instructional equipment and materials to religious schools in any circumstances, private schoolchildren may nonetheless participate in Title VI services provided directly to them by public school officials or contractors. As we have explained, however (Gov't Resp. 19-20), in many cases this is not a practicable alternative. Congress has not funded Title VI at a level that would permit the use of public school instructors to provide Title VI services to private schoolchildren in many circumstances. Thus, to an overwhelming degree, LEAs ensure the participation of private schoolchildren in Title VI benefits (as they are required to do by statute, see 20 U.S.C. 7372(a) and (b)) by lending instructional equipment and materials to private schools. See Title VI Nat'l Steering Comm., *Elementary and Secondary Education Act (ESEA): Title VI: Innovative Education Program Strategies, National Compendium of State and Local Activities*,

1997-1998 School Year 2.3 (Feb. 1999) (lodged with the Clerk).

4. In our initial brief, we informed the Court (at 2-3 n.1) that the President would shortly announce proposals for the reauthorization and revision of the ESEA. The President's legislative proposal was publicly announced on May 21, 1999. Copies of the proposed legislation and the accompanying section-by-section analysis have been lodged with the Clerk and served on the parties.

As we explained earlier, the President's proposed revision of the ESEA would not extend Title VI in its current form. However, a revised Title III of the ESEA, entitled "Technology for Education," would authorize LEAs and other entities to use federal funds for, among other things, adapting or expanding existing and new applications of technology in learning environments, acquiring advanced technologies and access to advanced telecommunications, and using web-based learning resources. See proposed legislation, at III-49 to III-50, proposing a new ESEA § 3134; see also section-by-section analysis, at III-18. In addition, a new Title II-A-2 of the ESEA, focusing on professional development for teachers, would authorize LEAs receiving federal funds to use funds for the development and acquisition of curricular materials and other instructional aids, if they are not normally provided by the LEA or the State as part of the regular instructional program. See proposed legislation, at II-31, proposing a new ESEA § 2130(11); section-by-section analysis, at II-1.

Provisions similar to those in the current version of the ESEA, requiring LEAs to provide for the equitable participation of private schoolchildren in program benefits, prohibiting the use of federal funds to sup-

plant non-federal sources, and requiring that all benefits be secular, are also included in the President's proposed legislation. Title XI of the revised ESEA would continue in effect, for the new Title II-A-2 and Title III, both the statutory requirement currently applicable to Title III and Title VI that LEAs provide benefits under the program to private schoolchildren on an equitable basis, and also the requirement that any educational services or benefits made available under those programs, including materials and equipment, be secular, neutral, and nonideological. See proposed legislation, at XI-18, which would amend ESEA § 14503, 20 U.S.C. 8893; see also section-by-section analysis, at XI-8. In addition, both Title II-A-2 and Title III, as revised, would require that a recipient of federal funds use those funds only to supplement the funds or resources available from non-federal sources, and not to supplant those non-federal funds or resources. See proposed legislation, at II-35 and III-10; section-by-section analysis, at II-6 and III-2.

Accordingly, under the proposed revision of the ESEA, federal funds would be available for programs similar to those currently funded under Title VI, involving the acquisition and use of computer technology for loan to schools, including private religious schools. Also, as under the current Title VI, LEAs would be required to provide for the equitable participation of private schoolchildren in the benefits of such federal programs, which must be secular, neutral, and nonideological, and which may not supplant non-federal funds and resources.

* * * * *

For the foregoing reasons, and for those set forth in our initial brief, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

MAY 1999